Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

ROY H. LUCAS and HOWARD C. LUCAS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Due to a divergence of opinion among the United States Courts of Appeals, should this Court decide whether, under §1421 of the Tax Reform Act of 1986, an estate electing special use valuation of farm property as allowed by 26 U.S.C. § 2032A can submit "substantially all" of the "information" necessary for the special use election, *even when the required "recapture agreement" is not included with the estate tax return,* thus permitting the estate to perfect its special valuation election with a later-filed agreement?

2. Did Petitioners "substantially comply" with requirements for electing special use valuation of farm property under 26 U.S.C. § 2032A and applicable regulations, and should the IRS thus have accepted Petitioners later-filed recapture agreement which fully complied with those regulations?

3. In deciding whether a taxpayer has "substantially complied" with requirements for electing special use valuation for farm property, should it be considered that, notwithstanding the absence of any required recapture agreement when the estate tax return is filed, the purpose of the agreement is met if State law in any event prevents a taxpayer from claiming different benefits or from otherwise repudiating the election?

LIST OF PARTIES

The parties to this petition are as stated in the title sheet of the Petition:

Petitioners:

Howard C. Lucas
Co-personal representative of the estate of Charles R. Lucas

Roy H. Lucas
Co-personal representative of the estate of Charles R. Lucas

Respondent:

United States of America
Department of the Treasury
Internal Revenue Service

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Roy H. Lucas and Howard C. Lucas, Petitioners, by their attorney, under appropriate rules of this Court, request that this Court issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The United States District Court for the Middle District of Florida granted judgment for the United States, as a matter of law, upon the Government's motion for judgment at the close of all the evidence, during a jury trial on Petitioners' complaint seeking a refund of certain estate tax paid. The District Court ruled that Petitioners were not entitled to perfect or correct their election on behalf of the estate of their deceased father, for special use valuation of certain farm property under 26 U.S.C. § 2032A. The court concluded that, due chiefly to the absence of a "recapture agreement" in the initial election documentation when the estate tax return was filed, the special valuation election and documentation as filed with the return did not "substantially comply" with § 2032A requirements, for purposes of § 2032A(d)(3) provisions allowing for later perfection of a less-than-complete valuation election, and also did not supply "substantially all" of the "information" required for such an election, under § 1421 of the Tax Reform Act of 1986 providing similar relief.

The District Court's order of February 23, 1995 was issued from the bench without an opinion. The judgment as entered is reproduced in the Appendix at App. 32a.

The opinion of United States Court of Appeals for the Eleventh Circuit is reported at 97 F.3d 1401 (11th Cir. 1996). The Eleventh Circuit affirmed the District Court's determination that Petitioners were not entitled to the special valuation exemption for certain farm property. The court found the initial

election was not in "substantial compliance" with requirements and therefore could not be later cured or perfected. The Eleventh Circuit's opinion, issued October 23, 1996, is reproduced in the Appendix at App. 1a-29a. The Eleventh Circuit's judgment is reproduced at App. 30a.

STATEMENT OF JURISDICTION

Jurisdiction of the United States District Court for the Middle District of Florida was invoked through 26 U.S.C. § 1346(a)(1) and Internal Revenue Code § 7422(a).

Jurisdiction of the United States Court of Appeals for the Eleventh Circuit was invoked under 26 U.S.C. § 1291.

Jurisdiction of this Court is invoked under 26 U.S.C. § 1254 and Rules 12.1 and 13.1 of the Rule of this Court, as amended. The decision of the United States Court of Appeals for the Eleventh Circuit was issued October 23, 1996. This Petition is being filed within 90 calendar days of that decision.

STATUTES AND REGULATION INVOLVED

26 U.S.C. § 2032A; Tax Reform Act of 1986, § 1421; Treasury Regulations 20 C.F.R. § 20.2032A-8. (*See* App. F, *infra*).

STATEMENT OF THE CASE

This matter concerns Petitioners' contention that, under 26 U.S.C. §§ 2032A and 1421 of the Tax Reform Act of 1986, respectively, they were in "substantial compliance" with requirements for an election of special use valuation of farm property, or submitted "substantially all" of the "information" necessary for such an election, despite the fact that a requisite

"recapture agreement" was not attached to the estate tax return when it was filed. This matter therefore poses crucial issues concerning these special valuation requirements and, indeed, all family farm property in the United States affected by them.

Petitioners filed a federal estate tax return on October 16, 1986, claiming special use valuation for certain farm property. The return, however, did not contain certain required materials for a "notice of election" of this valuation. Most significantly, the return did not include a "recapture agreement." An audit of the tax return was conducted approximately a year later. The Internal Revenue Service ("IRS") notified Petitioners that their election was defective. However, prior to any such notification, a recapture agreement that was in full compliance with Treasury Regulations (as Respondents have acknowledged), was submitted by Petitioners as soon as the deficiency was independently discovered by them.

Nevertheless, the IRS informed Petitioners that their effort to correct the deficiencies concerning the original special valuation election would not be accepted, because the *initial* election was not in "substantial compliance" with the regulations, due chiefly to the absence of the "recapture agreement" when the return was filed. Therefore, the original election could not be cured or perfected.

The IRS thus assessed a total tax upon the estate, absent the special valuation for the farm property, of $87,131. Petitioners paid the tax. On June 26, 1989, Petitioners sought a refund. On March 26, 1990, the IRS denied Petitioners a refund.

On May 20, 1991, Petitioners filed a Complaint seeking a refund, in the United States District Court for the Middle District of Florida. Petitioners sought a jury trial. The Complaint was answered, as was an Amended Complaint filed some time later.

A motion for summary judgment was filed by the IRS, and was at that time denied.

On February 21, 1995, a jury trial commenced on Petitioners' Complaint. A motion for judgment by the IRS at the close of the Government's case was denied. However, a similar motion (either a renewed motion for judgment or a renewed motion for summary judgment) was granted by the court at the close of all the evidence. The jury was discharged. Judgment for the IRS was entered by the District Court on February 27, 1995.

Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit on March 20, 1995. The Eleventh Circuit, on October 23, 1996, affirmed the District Court.

In an extensive opinion, and recognizing a conflict between Circuits, the Eleventh Circuit affirmed the District Court. The Eleventh Circuit concluded that the absence of the recapture agreement when the initial return was filed meant Petitioners could not be in "substantial compliance" with special valuation requirements for 26 U.S.C. § 2032A provisions allowing for correction of an initially deficient election, and also meant that they could not have supplied "substantially all" of the required "information" for the election in order to cure any deficiency under § 1421 of the Tax Reform Act of 1986. Petitioners now seek review by this Court.

STATEMENT OF FACTS

A. General Background, "Special Use" Valuation Requirements

Charles R. Lucas, a resident of Florida, died testate on December 15, 1995 at the age of 95. His two sons, Roy H. and

Howard C. Lucas, Petitioners here, were co-personal representatives of his estate and his sole heirs. The chief asset of the Lucas estate was certain farm property in Polk County, Florida of approximately 30.2 acres, devoted to citrus growing and a cattle range.

The Lucas brothers proceeded with filing a federal estate tax return for the farm. They engaged an accountant and an attorney for these purposes. On September 9, 1996, Petitioners sought an extension for filing the return. They intended to elect a "special use valuation" for the farm property, under 26 U.S.C. § 2032A.

The special use valuation option permitted by Congress allows a farm to be valued, for federal estate tax purposes, at less than the property's "highest and best use." This results in a substantially lower valuation and accompanying tax. This option was established to assist family farms, so that farm property would not have to be sold to pay a tax assessed if the property were valued at its "highest and best use."

There are certain requirements to qualify for this special use valuation. (*See* 26 U.S.C. § 2032A). Among them are that the property must be farm property, the decedent or a member of the decedent's family must have worked the property for a certain number of years prior to the decedent's death, and the property must continue to be used as farm property after the election of special use valuation.

Further, there are numerous and precise requirements for documenting the special valuation election on an estate tax return. (*See* Treasury Regulation § 20.2032A-8(a)(3)). Among these are that the box on Form 706 for a special valuation must be checked "Yes." A Schedule N must be completed with a "notice of election" satisfying certain other criteria. And there must also be attached a "recapture agreement."

The "notice of election" is to contain 14 items:

(i) the decedent's name and taxpayer identification number as they appear on the estate tax return;

(ii) the relevant qualified use;

(iii) the items of real property shown on the estate tax return to be specially valued through this election;

(iv) the fair market value of the real property involved as well as the value to be claimed under the qualified use;

(v) the adjusted value of all real property used in a qualified use and which passes from the decedent to a qualified heir, as well as the adjusted value of all real property to be specially valued;

(vi) items of personal property shown on the estate tax return that pass from the decedent to a qualified heir and are used in a qualified use and the total value of such personal property as adjusted;

(vii) the adjusted value of the gross estate;

(viii) the method used in determining the special value of the property;

(ix) copies of written appraisals of the fair market value of the property;

(x) a statement that the decedent or a member of the decedent's family has owned all specially valued real property for at least 5 of the 8 years immediately prior to decedent's death;

(xi) a statement as to any periods during the 8-year period prior to decedent's death during which the decedent or a member of the decedent's family did not: own the property, use it in a qualified use, or materially participate in the operation of a farm (or other business within the meaning of § 2032A);

(xii) the name, address, taxpayer number, and relationship to the decedent of each person with an interest in each item of specially valued property, and the value of the interests passing to each such person based on fair market value and qualified use;

(xiii) affidavits describing the activities constituting material participation in the use of the property as a farm (or other business under § 2032A) and the identity of the material participant or participants; and

(xiv) a legal description of the property.

The additionally required "recapture agreement" must be executed by all parties who have an interest in the property involved as of the date of decedent's death. It must contain a "consent to personal liability" under § 2032A(c) for additional tax in the event of certain early dispositions of the property or of early cessation of the qualified use." The recapture agreement also must bind all parties having an interest in the property and must designate an agent with authority to act for the parties.

The instructions for Form 706 state that regardless of the size of the gross estate, "Schedule N and its required attachments must be filed with the Form 706 for this election to be valid." The Form 706 instructions are specific.

B. Deficiencies in "Special Use Valuation" Election

On October 16, 1996, an estate tax return was filed by Petitioners, using the March, 1985 version of Form 706. The return reported a gross estate of $368,853, a taxable estate of $348,947, *and no tax due*. The estate claimed a "special use valuation" of the 30.2 acres of farm property. The fair market value of this property was reported as $275,000, with a "special use" value of $80,000.

However, as Petitioners acknowledge, there were deficiencies in this return as to the formalities of the special use election. In answer to the question on page 2 of Form 706, requesting an indication of whether the estate intended to elect a special use valuation of farm property, *the "yes" box was not checked.*

The estate attached a "notice of election" to Schedule N for the special use valuation of the 30.2 acres in the Lucas farm property. The notice of election was entitled "Affidavit from Personal Representative" and included most of the 14 items requested under Regulations § 20.2032A-8(a)(3). Three such items were missing:

(x) a statement that the decedent or a member of the decedent's family owned the property involved for at least 5 of the 8 years prior to decedent's death;

(xi) a statement as to any times during that 8-year period during which the decedent or a member of the decedent's family did not own the property, use it in a qualified use, or materially participate in the operation of the farm; and

(xiii) affidavits describing the activities constitution material participation and the identify of the material participant or participants.

The estate's notice of election noted items (x) and (xi) and answered "affidavit attached." However, no such affidavits were attached. As to (xiii), the answer stated "affidavits herewith." An affidavit was attached describing briefly Charles Lucas' activities on the farm. Petitioners signed this affidavit but did not sign the "notice of election."

As to the further requirement of a "recapture agreement," *no recapture agreement was attached.* Nevertheless, Form 706, Schedule N, affidavits, and attachments, as noted, were filed with the estate tax return claiming the special use valuation.

C. IRS Denies Special Use Valuation, Assesses Tax

An audit of the estate tax return was conducted. On March 7, 1988, the estate, prior to notification to this effect by the IRS, submitted a recapture agreement that fully complied with the requirements of the Treasury Regulations.

However, the IRS denied special use valuation for the 30.2 acres. The IRS informed Petitioners that they could not "cure" or "perfect" the special use valuation election by the later filing of the recapture agreement. Such an action is permitted if the initial election and documentation with the return is in "substantial compliance" with the special use valuation requirements or includes "substantially all" of the "information" necessary for that valuation. The IRS determined that the estate's initial election and documentation did not meet those standards.

The IRS thus valued the 30.2 acres of Lucas farm property at fair market value. The estate, through Petitioners, paid the $87,131 assessment. On June 26, 1989, Petitioners filed a claim for a refund which was denied on March 26, 1990.

D. Complaint and Proceedings in District Court

On May 21, 1991, the estate through Petitioners brought an action in the United States District Court for the Middle District of Florida, under 26 U.S.C. § 1346(a)(1) and IRC § 7422(a). (For the amended Complaint, *see* App. 33a-35a).

The Government's earlier summary judgment was denied. However, on February 23, 1995, during the jury trial and after conclusion of all the evidence, the court granted the Government's motion for judgment.

There was evidence before the District Court that the accountant for Petitioners, who prepared the estate tax return and the initial election for farm property exemption, was in extremely ill health. He had a brain tumor and other problems. Petitioners argued this was a "good cause" reason for the lack of certain supporting material with the return. However, the District Court ruled that the special valuation election could not be cured by Petitioners' later submission of the recapture agreement. The IRS determination denying the special use valuation prevailed.

On appeal, Petitioners contended that, as held by some Federal Circuit Courts of Appeal, the estate tax return and documentation submitted by Petitioners for the Lucas estate did constitute "substantial compliance" with IRS requirements for a special use valuation or did supply "substantially all" of the necessary "information" for this election, notwithstanding the absence of a recapture agreement when the return was filed. Accordingly, the IRS should have accepted the later-filed recapture agreement.

The primary rationale of a recapture agreement is to ensure personal responsibility of heirs or those with an interest in the

property involved for additional tax if the property is no longer used, within the required time period (10 years), for the purpose which entitled it to special use valuation. Petitioners therefore also argued that Florida law, at least as to estoppel, prevents Petitioners in any event from withdrawing or repudiating their election — providing the same effect as the recapture agreement.

E. Eleventh Circuit Opinion

The Eleventh Circuit, in its extensive opinion, noted that Congress' allowance of the special use valuation is viewed as "as an act of legislative grace." Thus the IRS and the courts have strictly construed § 2032A and its requirements.

Reviewing the current authority in these circumstances, the Eleventh Circuit first found that the initial absence of the recapture agreement was fatal to whether the estate was in "substantial compliance" with IRS requirements for the special use valuation under provisions of § 2032A allowing for a valid election so long as that election is in "substantial compliance" with those requirements (and so long as any additional information requested by the IRS is submitted by the estate within 90 days of the request). The court stated:

> The foregoing explanation of the essential nature of a recapture agreement leads ineluctably to the conclusion that a taxpayer does not "substantially comply" with the requirements for electing special use valuation without submitting a recapture agreement with the return. Moreover, the case law from every circuit court of appeals to have considered this issue, as well as the United States Tax Court, clearly supports this holding.

(App. 15a-16a, citations omitted).

Therefore, "we hold that the Estate has not satisfied the substantial compliance provisions of § 2032A(d)(3) and thus is not entitled under that section to perfect its deficient election."

Second, as to the argument that Petitioners also should have been able to perfect their election of special use valuation under § 1421, the Eleventh Circuit found that the first two conditions of that Section were satisfied (date of death of decedent and whether an "election" was made of special use valuation despite the fact that the "yes" box on the form was not checked). However, the court concluded Petitioners did not meet the essential third condition of that section, namely that the initial return provide "substantially all" of the required "information." Again, the absence of the recapture agreement was crucial to the court's decision that the estate did not meet that condition of § 1421.

The Eleventh Circuit observed, however, a split of authority on this issue among the circuits. Considering the language of § 1421, the court concluded that a recapture agreement is a "significant" item of information needed for a "substantially" complete return, thus following those circuits so deciding. The court stated the recapture agreement is "an essential element for a valid election" for special use valuation. It found that § 1421 was enacted to correct misimpressions which may have occurred in earlier versions of Form 706 which did not expressly specify the importance of including a recapture agreement when filing the estate return.

Thus disagreeing with other opinion to the contrary, the Eleventh Circuit determined a recapture agreement must be included in the initial estate tax return in order for it to have provided, within the meaning of § 1421, "substantially all" of the "information" for a special use valuation election. Thus, as the court stated:

> In order to take advantage of § 1421, the taxpayer must have provided "substantially all" of the "information" requested by the tax return. In light of our earlier discussion of the importance of the recapture agreement, and in light of our holding that the omission of a recapture agreement precludes "substantial compliance" with the requirements for electing special use valuation for purposes of § 2032A(d)(3), we readily conclude that the Estate in this case failed to provide "substantially all the information . . . required on such return of tax" within the meaning of § 1421(a)(2).

(App. 28a-29a).

The Eleventh Circuit thus affirmed the District Court.

REASONS FOR GRANTING WRIT

I.

THE BETTER REASONED VIEW AMONG THE CIRCUITS IS THAT, WITHIN THE MEANING OF 26 U.S.C. § 1421, AN ESTATE CAN PROVIDE "SUBSTANTIALLY ALL" OF THE "INFORMATION" REQUIRED FOR A SPECIAL USE VALUATION ELECTION EVEN WITHOUT INITIAL SUBMISSION OF A RECAPTURE AGREEMENT, AND THEREFORE THE I.R.S. SHOULD HAVE ACCEPTED PETITIONERS' LATE FILING.

Congress established special use valuation of real property under § 2032A to benefit family farms and similar properties.

This special valuation avoids the misfortune of having to sell the farm property in order to pay a tax assessment based on valuing the property at fair market value. *Generally, Mangels v. United States*, 828 F.2d 1324 (8th Cir. 1987); *Estate of Doherty v. Commissioner*, 982 F.2d 450 (10th Cir. 1992); *Estate of Sherrod v. Commissioner*, 774 F.2d 1057 (11th Cir. 1986), *cert. denied*, 479 U.S. 814; and H.R. Rep. No. 94-1380, 94th Cong., 2nd Sess. (1976), *reprinted in* 1976 U.S. Code Cong. and Admin. News 2897, 3356, 3375-76.

As the court stated in *McAlpine v. Commissioner*, 968 F.2d 459 (5th Cir. 1992), remarking on the legislative purpose behind the special use valuation:

> The federal government generally imposes estate taxes on real property according to its fair market value, as measured by its highest and best use. § 2031(a). Congress has created an exception to the rule, however, for family farms and businesses. The purpose of the exception is to grant relief to heirs of such properties who might otherwise find the financial burden imposed by the estate tax so great that it would be necessary to sell the farm or business to pay the tax. Under § 2032A, estates that include qualified real property may elect to value the property on the basis of its actual use instead of its most profitable use. The provision thus allows heirs of qualified farms and businesses to write down the property they inherit and escape higher taxation based on actual market values.

(Citations omitted).

Congress thus clearly recognized the importance of this special use valuation and its significance for family farms. However, as *McAlpine* and other courts have remarked, there are "strings attached." Chief among them is that the heirs must continue to use the property as a family farm or business for at least ten years following the decedent's death to avoid recapture of part of the tax savings resulting from special use valuation. Also, (as has been briefly detailed) electing special use valuation is a laborious process, requiring precise documentation and supporting information.

Although courts have strictly construed § 2032A and its applicable regulations, Petitioners contend that the congressional intent behind this provision nevertheless should be observed, lest form rule over substance. Difficulties or omissions concerning the manner in which an election for special use valuation, which can be corrected or satisfactorily addressed, should not be a basis for IRS denial of this very crucial estate tax benefit.

Along these lines, and as Congress itself expressed by § 1421 of the Tax Reform Act of 1986, relief is afforded an estate which makes an election for special valuation but does not provide all of the information with the estate tax return. The section clearly states that so long as an election is made under § 2032A and the estate has *"provided substantially all the information with respect to such election required on such return of tax"* then the election "shall be a valid election" for purposes of § 2032A of the Code.

There are certain provisions within § 2032A itself allowing for perfection of certain deficiencies in a special valuation election in an estate tax return. *See* 26 U.S.C. § 2032A(d)(3). However, § 1421 of the Tax Reform Act offers an additional measure of relief for estate tax returns taking this special valuation election which may be missing certain information.

For § 1421 to apply, three conditions must be satisfied: (1) the decedent must have died before January 1, 1986; (2) the taxpayer must have "made an election" for purposes of § 2032A; and (3) the taxpayer must have "provided substantially all the information with respect to such an election" with the estate tax return. (The Eleventh Circuit found that the first two requirements were met).

According to the Eleventh Circuit, Petitioners could not claim the benefit of § 1421 (and the estate thus is liable for an assessment based on a fair market value of farm property) because the absence of the recapture agreement when the return was filed *compels* the conclusion that "substantially all" of the "information" for the valuation was *not* supplied. *The Court so ruled despite other decisions to the contrary from other circuit courts of appeal.*

Notably, in *Prussner v. United States*, 896 F.2d 218 (7th Cir. 1990) (*en banc*), the Seventh Circuit expressly concluded that *failure to include a recapture agreement when filing the estate tax return is specifically the sort of circumstance contemplated by Congress when it enacted § 1421.* In *Prussner*, the attorney for the executor attached a letter to the return stating the recapture agreement was not included because the heirs to the property resides "throughout the United States." The letter said the attorney expected to send the IRS the agreement within a few weeks. Months later, the attorney filed a recapture agreement which complied with the Treasury regulation. The IRS denied the special use valuation. The estate paid the tax and brought an action in the District Court for a refund. The District Court found for the taxpayer under § 1421, and the Seventh Circuit affirmed.

The court observed, as has been noted, that § 1421 refers to an estate tax return where an special use valuation election has

been made and the return provides "substantially all" the "information" which respect to such an election required on "such return of tax." So long as the taxpayer provides to the Commissioner information requested by the Commissioner concerning the special use valuation election, within 90 days of that request (a requirement also stated in the similar provisions of § 2032A(d)(3)), the election is valid.

The Seventh Circuit remarked:

> There is nothing [in § 1421] about filing a recapture agreement or for that matter a notice of election. All that is required (in marked contrast to the Treasury regulation defining valid election for purposes of § 2032A) is the making of an election *on the estate tax return* — that is, the marking of the box for the election. The taxpayer who checks the box— that was done here — and provides substantially all the information that the return requires with respect to the election is home free.
>
> The estate tax return filed by Prussner contained all, not substantially all, the *information* with respect to the election that the return required. The only information required to be included in the recapture agreement and not also in the notice of election is the designation of an agent to act for the heirs in dealings with the IRS. * * * So the failure to file the agreement with the return did not make the information required on the return incomplete — and even if it did, section 1421(a)(2) requires only that

> *substantially* all the information required on the return be included, not all of it.

(Emphasis retained, citations omitted).

The court continued:

> The agreement itself is not information, but commitment. And it is not "on" the return, but attached to it — unless "return" includes everything required to be filed with it. But the government does not argue that "return" is to be understood so broadly. (There is no general statutory definition of "return.")

Therefore, as the *Prussner* court continued:

> The failure to file a recapture agreement could not be fatal *per se* to a claim under section 1421. The statute was intended precisely for the benefit of taxpayers who had failed to file an agreement.

The court reviewed the legislative history of § 1421 (*see* H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-770 to 771 (1986)) which notes that the provision "permits late filing of the required agreements for estates that used the March, 1982 edition of Form 706." The conference report actually was referring to the June, 1982 edition of Form 706 but the *Prussner* court determined that, in any event, the issue is the plain application of the *section*:

> We know from the legislative history as well as the language of section 1421 that the statute is intended precisely for the benefit

> of taxpayers who failed to file the recapture agreement on time. The suggested anomaly is built into the statute. It would not be removed by interpreting the statute to require compliance with the directions on the return, since the June 1982 form, which the government itself considers the focus of the statute, contains no direction to file the agreement with the return.

Due not only to the nature of the version of Form 706 at issue but also to the approach and direction of § 1421, the *Prussner* court concluded that even if a taxpayer cannot come within certain saving provisions within § 2032A, the language of § 1421 validating a special use valuation when the taxpayer supplies "substantially all" the "information" required "on the return" can be invoked *even if the taxpayer did not file a recapture agreement with the return.*

In general accord with *Prussner* is *Estate of Doherty v. Commissioner, supra*, 982 F.2d 450 (10th Cir. 1992) at 456. The taxpayer had not attached to the return an appraisal of the fair market value of the property involved. The *Doherty* court found, notwithstanding that omission, the return provided "substantially all" of the information required for the special use valuation election.

The *Doherty* court stated it was "greatly persuaded" by the rationale of *Prussner.* The court remarked [footnote omitted]:

> In the instant case, Doherty marked the box for the election on the estate's tax return, which indicated special use valuation election, and he provided substantially all the information as to the election the tax return

> required. We believe, therefore, that the present case is comparable to *Prussner*. In *Prussner*, the executor failed to attach to the return a recapture agreement, and, in the instant case, Doherty failed to attach to the return an appraisal. Accordingly, we reach the same conclusion here that the Seventh Circuit reached in *Prussner*: Doherty made a valid election for special use valuation under provisions of §1421 of the Tax Reform Act of 1986.

Further, as the Eleventh Circuit pointed out, in the present instance, the "yes" box on the tax form concerning the special use valuation election was not checked. Yet the Eleventh Circuit found that omission was not dispositive:

> We are not persuaded that the Estate's failure to mark the appropriate box is sufficient, by itself, to preclude relief under § 1421. In this case, despite the failure to mark the box, the Estate expressed a clear intent on the estate tax return to elect special use valuation. . . . .

Underscoring the divergence of opinion among the circuits on this issue of the application of § 1421, the *Doherty* court, while following *Prussner*, expressly noted and declined to follow *Foss v. United States*, 865 F.2d 178 (8th Cir. 1989), *rehearing denied*, and *McDonald v. Commissioner*, 853 F.2d 1494 (8th Cir. 1988), *cert. denied sub nom. Cornelius v. Commissioner*, 490 U.S. 1005. The *Prussner* court also noted and distinguished these decisions.

The court in *Foss* found that relief was not available under § 1421 by a strict review of the statute. The *McDonald* court, in

a very precise application of the section, determined relief under § 1421 was not available where an estate *did* submit a recapture agreement with the estate tax return signed by the widow, *but which did not contain the signatures of the widow's children*. An amended return contained a recapture agreement with all the signatures. Yet the *McDonald* court concluded, reviewing the section:

> Based on our review of the legislative history, however, we conclude that the omission from the recapture agreement of the signatures of all persons with an interest in the property is not the type of slight technicality envisioned by Congress when the 1984 amendment [to § 2032A] was enacted.

See also footnote 8, concluding that the 1984 amendment to § 2032A permits the correction of only "slight technical failures."

To these varying approaches regarding the application of § 1421 can be added *McAlpine v. Commissioner*, 968 F.2d 459 (5th Cir. 1992) (also noting that savings provisions of § 2032A were only intended to address "slight technical defects" in a notice of election or an estate tax return) and *Barlett v. Commissioner*, 937 F.2d 316 (7th Cir. 1991) (finding that § 1421 issue was not preserved for appeal but nevertheless indicating, in discussing perfecting of special valuation election under § 2032A(d)(3), that failure to file recapture agreement with return was not correctable omission).

This division among the circuits over the application of § 1421 and over the scope of the term "information" for § 1421 purposes has created a rift regarding the interpretation of this section. The rift is of significant concern due to: the breadth of

the field covered by this question — family farms throughout the United States, the exactitude which appears to be required for the special use valuation to be valid, the penchant of the IRS to deny this valuation for the slightest of deficiencies, the importance of the issue in terms of the congressional expressed through § 2032A to keep family farms intact, and the high stakes of potentially oppressive tax assessments awaiting family farms electing special valuation if the valuation is denied.

Petitioners are aware that this Court has denied certiorari in prior circuit decisions involving this topic (*see, e.g., Sherrod* and *McDonald*, both *supra*). Nevertheless, this question is a persistent one which requires the intervention of this Court. The extremely precise construction imposed upon the special valuation election by the IRS has prompted Congress twice to issue amendments affording relief from the agency's hypertechnical application of the election — § 1421 and 26 U.S.C. § 2032A(d)(3). To settle the divisions among the circuits, plainly to declare the extent of the relief available under § 1421, and to reaffirm Congress' intent to aid family farms, Petitioners urge this Court to grant this petition.

II.

PETITIONERS WERE IN "SUBSTANTIAL COMPLIANCE" WITH REQUIREMENTS FOR ELECTING SPECIAL USE VALUATION OF FARM PROPERTY UNDER § 2032A, AND THUS THE I.R.S. SHOULD HAVE ACCEPTED THE LATE FILING OF THE RECAPTURE AGREEMENT, REGARDLESS OF WHETHER THE LATE FILING WAS SUBMITTED BY PETITIONERS ON THEIR OWN OR FOLLOWING NOTIFICATION BY THE I.R.S. THAT THE SPECIAL VALUATION ELECTION WAS DEFICIENT.

As mentioned, Congress also amended § 2032A to provide similar relief to that offered in § 1421. That language, § 2032A(d)(3), allows for "perfecting" a special use valuation election which is deficient in some manner. It addresses situations where an election is made with a timely filed estate tax return which "substantially complies" with the requirements for making the election, but the notice of election "does not contain all required information," or, with respect to the required "recapture agreement," the agreement does not contain all the signatures or does not contain "all required information." As is also indicated in § 1421, under § 2032A(d)(3) the estate has a reasonable period of time (up to 90 days) to provide information or agreements upon being notified by the IRS of the deficiency.

"Substantial compliance," like "substantially all the information," is a term left undefined by § 2032A. The Secretary of the Treasury has not issued procedures governing this question. It is left to the courts to determine whether a taxpayer has "substantially complied" with the applicable regulations such that perfection of a special valuation election is permitted under § 2032A(d)(3). *See McAlpine, supra.*

Petitioners contend they met the provisions of § 2032A(d)(3). This was flatly rejected by the Eleventh Circuit. After examining § 2032A(d)(3), its legislative background, and other decisions on the issue, the court found that for purposes of any later "perfection" of the special use valuation under § 2032A(d)(3), the lack of a recapture agreement with the estate tax return *cannot be cured*. Rather, "perfection" as allowed by § 2032A(d)(3) for deficiencies in the special use valuation election is directed only to minor errors and omissions in the return.

The Eleventh Circuit noted that "case law from every circuit court of appeals to have considered this issue, as well as the United States Tax Court, clearly supports this holding." *Citing, Estate of Hudgins v. Commissioner*, 57 F.3d 1393 (5th Cir. 1995) (special use valuation can never substantially comply with valuation requirements for purposes of § 2032A(d)(3) if estate tax return is not accompanied by the recapture agreement); *Prussner v. United States, supra*, 896 F.2d 218 (7th Cir. 1990) (failure to attach recapture agreement to estate tax return cannot satisfy substantial compliance provisions of § 2032A(d)(3)); *McDonald v. Commissioner, supra*, 853 F.2d 1494 (8th Cir. 1988) (timely recapture agreement without necessary signatures was not substantial compliance); and *Estate of Merwin v. Commissioner*, 95 T.C. 168 (1990) (failure to attach recapture agreement precludes requisite substantial compliance under § 2032A).

Petitioners recognize that the weight of authority is against the proposition that an estate can "substantially comply" with special use valuation requirements under § 2032A(d)(3) despite the absence of a recapture agreement with the return. Nevertheless, Petitioners point out that the purpose of a recapture agreement is to bind the heirs of the property involved and all those who have an interest in the property to the special valuation

election and hold them personally responsible for the additional tax if the special use of the property is not maintain for the required ten-year period. Yet, it is beyond question that, regardless of any recapture agreement filed with the return, once the estate through its personal representative (who is often an heir) declares that election as part of its estate tax return, the heirs or those with an interest in the property *could not repudiate that election.*

Further, if the purpose of the special use valuation election itself is to provide tax relief to family farms so that they may continue, the assumption is that these properties *are* ongoing working family farms that are expected to continue. The special valuation election basically ensures that the family farm would not have to be sold after the death of one of the property owners due to a high tax assessment against the estate based upon a fair market valuation of farm property.

In these respects, a recapture agreement merely confirms assumptions behind the special use valuation election: a working family farm which the heirs intend to maintain as such should not have to face a sale of the property in order to pay estate tax. Given these assumptions, the absence of a recapture agreement filed with the return should be excused under § 2032A(d)(3) *so long as* the estate timely submits such a recapture agreement upon notification by the IRS that the recapture agreement is to be provided.

Therefore, this issue also warrants review by this Court. The extent and purpose of the special valuation election and the significance of the issue for family farms necessitates a more expansive review of the circumstances under which the relief provided by § 2032A(d)(3) can be invoked.

III.

THE BASIC PURPOSE OF A RECAPTURE AGREEMENT IS MET BY ELEMENTS OF STATE LAW PREVENTING PETITIONERS FROM DISCLAIMING OR REPUDIATING THEIR SPECIAL VALUATION ELECTION, AND THUS THE ABSENCE OF A RECAPTURE AGREEMENT IN THE INITIAL ESTATE TAX RETURN WAS NOT FATAL TO COMPLIANCE WITH SPECIAL USE VALUATION REQUIREMENTS.

Following on that purpose of a recapture agreement, it must also be emphasized that the purpose behind a recapture agreement *may also be met by operation of state law*. As stated, the recapture agreement is intended to ensure that the heirs will be personally liable for any additional estate tax assessment (plus any penalties), if the property involved is not used as farm property for the entire ten year period required under the special use election. Or, the heirs are to be personally liable for the defaulted tax benefit if, by the time recapture is triggered, the value of the property has so declined that a tax lien may not be viable. The recapture agreement places the signatures and personal guarantee of the heirs (and those with an interest in the property) upon the special valuation election and its time requirements.

However, *such purposes are also well served by operation of state law*. In this instance, for example, the two co-personal representatives were the only qualified heirs. They signed the estate tax return and made the special valuation election. As such, both co-personal representatives were subject to personal liability for the payment of estate taxes under the general laws or doctrines of Florida (and other states recognizing, for example, the doctrine of estoppel). *See New York Life Insurance Company v. Oats*, 141 Fla. 164, 192 So. 637 (1939). Lord Coke's

statement best describes the estoppel in this instance (*see Davis v. Davis*, 132 So. 2d 476 (Fla. 1st DCA 1961), *rehearing denied*:

> It is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.

See, e.g., McGhehee v. Mata, 330 So. 2d 248 (Fla. App. 3d DCA 1976) (plaintiff was estopped from asserting a claim to return of money invested in business where after settlement negotiations defendants sent plaintiff $3,000 check conditioned upon plaintiff's execution of a release of her claims, and plaintiff cashed check but never executed release); *Miami Retreat Foundation v. Ervin*, 62 So. 2d 748 (Fla. S. Ct. 1952) (generally as to estoppel), and *State ex rel. Watson v. Gray*, 48 So. 2d 84 (Fla. S. Ct. 1950) (estoppel by conduct).

Therefore, under well-established estoppel principles, as well as other similar prevailing doctrines in state law, the heirs signing the return are bound by their election, or, by the same token, a personal representative or executor of an estate signing the return would thus bind the estate and therefore all heirs under the estate to the requirements of that election. Others having an interest in the property would be similarly affected.

The effect or significance in general of state law as to the requirements of special valuation election has been recognized. *Cf. Estate of Merwin v. Commissioner*, 95 T.C. 168 (1990) (reviewing, and rejecting on technical grounds, the taxpayer's contention that the operation of California law meets purposes similar to the basis for a recapture agreement and thus the recapture agreement is "superfluous").

Thus, once Petitioners filed the estate tax return and election

special valuation election of the farm property, and accepted the benefits of that election with a lower estate tax due to the property not being valued at market price, they are estopped under state law from denying or repudiating the tax. The sole heirs of this estate, who are also the co-personal representatives and Petitioners here, therefore are liable for any increase in tax, due to principles of estoppel binding them to their election, *regardless of whether a recapture agreement is filed.*

The purposes of a recapture agreement thus are served. As such, the Eleventh Circuit erred in affirming the District Court on the basis of the absence of the recapture agreement is a fatal flaw in the special valuation election. And notwithstanding the weight of authority on the issue of a recapture agreement, the question of the extent and scope of § 2032A remains of central significance to the future of family farms and warrants review by this Court.

Petitioners therefore request that this Court review § 2032A and conclude that even without a recapture agreement, special valuation election in an estate tax return has force and significance due to operation of state law. Thus, the election nevertheless is valid.

CONCLUSION

Therefore, Petitioners Roy H. and Howard C. Lucas request of this Court that it grant their Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED OCTOBER 23, 1996

In Re: ESTATE OF Charles R. LUCAS, Deceased, Plaintiff,

Roy H. LUCAS; Howard C. Lucas, Co-Personal Representatives of the Estate of Charles R. Lucas, Plaintiffs-Appellants,

v.

UNITED STATES of America, Defendant-Appellee.

No. 95-2370

United States Court of Appeals
Eleventh Circuit.

Oct. 23, 1996.

* * *

Appeal from the United States District Court for the Middle District of Florida.

Before HATCHETT, Circuit Judge, ANDERSON, Circuit Judge, and WOOD* Senior Circuit Judge.

ANDERSON, Circuit Judge:

In this federal estate tax case, the government determined that the Estate of Charles R. Lucas (the Estate) was not entitled to "special use valuation" of certain family farm property pursuant to section 2032A of the Internal Revenue Code. *See* 26

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* Honorable Harlington Wood, Jr., Senior U.S. Circuit Judge for the Seventh Circuit sitting by designation.

U.S.C. § 2032A. The first issue on appeal is whether the Estate's initial effort to elect special use valuation was sufficient to constitute "substantial compliance" with the applicable regulations, thereby entitling the Estate to perfect its election upon notice from the I.R.S. that the original election was deficient. *See* 26 U.S.C. § 2032A(d)(3). A related issue is also presented: whether the Estate provided "substantially all the information" required on the estate tax return with respect to the election for special use valuation, such that the I.R.S. should have allowed the Estate to perfect its previously deficient election. *See* Tax Reform Act of 1986, Pub.L. No. 99-514, § 1421, 100 Stat. 2085, 2716, as amended by the Technical and Miscellaneous Revenue Act of 1988, Pub.L. No. 100-647, § 1014(f), 102 Stat. 3342, 3562. We find that the Estate's election for special use valuation did not substantially comply with the applicable regulations, nor did it provide substantially all the information required on the tax return. Accordingly, we affirm the district court's entry of judgment in favor of the government.

I. FACTS AND PROCEDURAL HISTORY

Charles R. Lucas (decedent) died testate on December 15, 1985. Howard C. Lucas and Roy H. Lucas are the decedent's sons and the co-personal representatives of his estate. Under their father's will, they are also the only legatees to certain Polk County, Florida farm land, the valuation of which is at issue in this case.

After receiving an extension from the I.R.S., the Estate filed a timely federal estate tax return on October 16, 1986. The Estate used the March 1985 version of Form 706. On line 2 of page 2 of the form, in response to the question, "Do you elect special use valuation?," the Estate failed to check either the "yes" or

"no" box. Immediately below the question, Form 706 instructs that, "If 'Yes,' complete and attach Schedule N and the agreements required by the instructions to Schedule N."

Despite its failure to check the "Yes" box on page 2 of the return, the Estate completed a Schedule N. Schedule N of Form 706 (March 1985), entitled "Section 2032A Valuation," directs the taxpayer: "Enter the requested information for each party who received any interest in the specially valued property. Also complete and attach the required agreements described in the instructions." [1] The Estate's Schedule N lists Roy H. Lucas and Howard C. Lucas, the decedent's two sons, as the parties with an interest in the specially valued property. Under the preprinted headings "Fair market value" and "Special use value," the amounts $187,500 and $40,000, respectively, are listed for Roy Lucas. The same amounts are listed for Howard Lucas.[2]

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1. The instruction booklet accompanying the March 1985 version of Form 706 contains a section entitled "Instructions for Schedule N. — Section 2032A Valuation." This section instructs the taxpayer how to complete the Schedule N, lists the items of information that must be included in a required attachment called the "notice of election," and describes in detail the required "agreement to special valuation by persons with an interest in property."

2. On Schedule A of Form 706, where the taxpayer is required to list and describe all of its real property, the Estate included a description of the property that was to be specially valued. Item numbers 3A, 3B, and 3C are described as follows:

> 3A Parcel # 2 — West parcel consisting of 30.2 + A. of citrus grove and woodlands fronting on the South side of Crystal Beach Rd., and along the North shore of Lake Millsite. The grove consists of 7.3 + A., an old frame house occupies about 3A. near the N.W. end of parcel. Winter Haven, Florida.

(Cont'd)

Appendix A

The Estate attached to its return a document entitled "Affidavit from Personal Representatives," which purported to serve as the Estate's notice of election. This document contained most, but not all, of the fourteen items of information required by the applicable Treasury regulations to be included in the notice of election. *See* 26 C.F.R. § 20.2032A-8(a)(3).[3] Significantly,

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(Cont'd)

> 3B The remaining 2[illegible].6 A. is woodland used as native cattle range in conjunction with adjacant [sic] improved pasture owned by other members of Lucas family. Agricultural use value of this parcel. Winter Haven Florida.
>
> 3C The grove is a very old planting, substantial foot rot, ytd. blite or other die-back associated with old plantings.
>
> The highest and best use of parcels 3B and 3C is building lots — $375,000 but the agricultureal [sic] use valuse [sic] is. . . . 80,000 This property qualifies under Section 2032 A/S [sic] of the I.R.C.
>
> Winter Haven, Florida.

3. The Estate's notice of election did not contain a "statement that the decedent and/or a member of his or her family has owned all specially valued real property for at least 5 years of the 8 years immediately preceding the date of the decedent's death," as required by 26 C.F.R. § 20.2032A-8(a)(3)(x). Nor did it contain a statement of "[a]ny periods during the 8 year period preceding the date of the decedent's death during which the decedent or a member of his or her family did not own the property, use it in a qualified use, or materially participate in the operation of the farm or other business . . . ," as required by 26 C.F.R. § 20.2032A-8(a)(3)(xi). With respect to these items, the notice of election stated "affidavit attached." However, no additional affidavits were attached.

the Estate did not attach an "agreement to special valuation by persons with an interest in property," also called a recapture agreement, to its return. *See* 26 U.S.C. § 2032A(a)(1)(B) and (d)(2); 26 C.F.R. § 20.2032A-8(a)(3) and (c).

On audit of the estate tax return, the I.R.S. advised the Estate that the attempted election for special use valuation was defective, the primary reason being the Estate's failure to attach a recapture agreement. Subsequently, and within ninety days following the notice from the I.R.S. about the defective election, the Estate submitted a recapture agreement that fully complied with the requirements of the regulations. Nevertheless, the I.R.S. denied special use valuation for the properties in question. The I.R.S. took the position that the Estate's initial submission did not substantially comply with the applicable regulations, and the Estate therefore was not eligible subsequently to perfect its defective election under § 2032A(d)(3). The I.R.S. increased the amount of the gross estate, based on the excess of the fair market value of the real property in question over its value as farm land, and assessed a tax deficiency in the amount of $87,131.

The Estate paid the assessment, filed a claim for a refund, and when the claim was denied by the I.R.S., filed a complaint in federal district court. A jury trial was conducted. At the close of the evidence, the district court awarded judgment to the government as a matter of law, without sending the case to the jury. This appeal followed.

Appendix A

II. DISCUSSION

A. *Introduction: Special Use Valuation Under Internal Revenue Code § 2032A*

For purposes of calculating the federal estate tax, the value of real property included in the gross estate of a decedent is generally its fair market value. *See* 26 U.S.C. § 2031(a); 26 C.F.R. § 20.2031-1(b). In 1976, however, Congress authorized an alternate valuation method, "special use valuation," for certain family farms and other family businesses. Tax Reform Act of 1976, Pub.L. No. 94-455, § 2003, 90 Stat. 1520, 1856-62 (codified, as amended, at 26 U.S.C. § 2032A). Special use valuation allows qualified real property to be valued according to its actual use (e.g., as a farm), rather than at its fair market value based on its highest and best use (e.g., as a housing development or a shopping mall). The rationale underlying § 2032A is to reduce the tax burden on the estate's heirs, so that they are not forced to sell the family farm or business in order to pay the high estate taxes that would result if the property were taxed at its fair market value. *Estate of Sherrod v. Commissioner,* 774 F.2d 1057, 1061-62 (11th Cir.1985), *cert denied,* 479 U.S. 814, 107 S.Ct. 66, 93 L.Ed.2d 24 (1986); *Estate of Doherty v. Commissioner,* 982 F.2d 450, 453 (10th Cir. 1992); H.R.Rep. No. 94-1380, 94th Cong., 2d Sess., 21-22 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 2897, 3356, 3375-76.

To qualify for special use valuation, the estate must satisfy several substantive conditions. The decedent must have been a citizen or resident of the United States at the time of his or her death, 26 U.S.C. § 2032A(a)(l)(A); the property must be located in the United States, *id.* § 2032A(b)(1); the value of the property must exceed specified percentages of the decedent's gross estate

and adjusted estate, *id.*; the property must devolve to a "qualified heir," who must be a member of the decedent's family, *id.*, *id.* § 2032A(e)(1), (2); and the decedent or a member of the decedent's family must have materially participated in the operation of the farm or business at the time of the decedent's death and for five of the eight years preceding the decedent's death, *id.* § 2032A(b)(1).

Additionally, in order to avoid subsequent recapture of the tax savings produced by special use valuation, the property must remain in the ownership of the family and must be used for the qualified use for at least ten years following the decedent's death. 26 U.S.C. § 2032A(c). At the time of the election for special use valuation, the qualified heirs who inherited the property ("qualified heirs") must agree to keep the specially valued property in the family and to operate it for the qualified use for ten years. *Id.*, § 2032A(c) and (d)(2). The contract expressing such agreement by the qualified heirs, commonly called a "recapture agreement," must be executed and filed contemporaneously with the estate tax return. *Id.* § 2032A(a)(1). In this recapture agreement, the qualified heirs must bind themselves under state law to be personally liable to the government for a recapture tax in the event of a premature disposition of the property or an early cessation of the qualified use. 26 C.F.R. § 20.2032A-8(c).

Special use valuation of qualified real property does not occur just because the Estate satisfies all of the substantive conditions; rather, the Estate must affirmatively elect such treatment on the estate tax return. 26 U.S.C. § 2032A(a)(1)(B). The principal requirements for a valid election are (1) checking the appropriate box on the estate tax return and completing the Schedule N; (2) completing and attaching to the return a notice

of election, which contains all of the information specified in § 2032A and the applicable regulations; and (3) attaching a recapture agreement that has been signed by all parties with interests in the specially valued property, expressly consenting to personal liability for the recapture tax in the event of a premature disposition of the property or an early cessation of its qualified use. "Thus a Notice of Election and a Recapture Agreement, validly and completely executed and filed contemporaneously with the estate tax return, are essential prerequisites if an estate that elects special use valuation is to be in *full* compliance with § 2032A." *Estate of Hudgins v. Commissioner,* 57 F.3d 1393, 1397 (5th Cir.1995).

Treating Congress' allowance of special use valuation as an act of legislative grace, the I.R.S. and the courts have strictly construed § 2032A and its requirements. *See Prussner v. United States,* 896 F.2d 218, 220 (7th Cir.1990) (en banc). In response to complaints from taxpayers who were denied special use valuation because of their failure to comply fully with all of the procedural requirements for a valid election, Congress passed two statutes designed to block the I.R.S. from seizing upon slight technical defects, which would prevent otherwise qualified taxpayers from taking advantage of special use valuation. *See McAlpine v. Commissioner,* 968 F.2d 459, 461 (5th Cir. 1992). Under 26 U.S.C. § 2032A(d)(3), added by the Deficit Reduction Act of 1984, Pub.L. No. 98-369, § 1025, 98 Stat. 494, 1030-31, an estate whose initial election for special use valuation "substantially complies" with the applicable regulations may subsequently correct technical deficiencies within a reasonable period (not to exceed ninety days) following notice from the I.R.S. Section 1421 of the Tax Reform Act of 1986 provides similar relief to certain taxpayers who elected § 2032A treatment

on the estate tax return and provided "substantially all the information with respect to such election required on such return of tax." Tax Reform Act of 1986, Pub.L. No. 99-514, § 1421(a)(2), 100 Stat. 2085, 2716, as amended by the Technical and Miscellaneous Revenue Act of 1988, Pub.L. No. 100-647, § 1014(f), 102 Stat. 3343, 3562.

In the instant case, the Estate concedes that its election for special use valuation did not fully comply with the applicable regulations. However, the Estate argues that its initial effort to elect special use valuation "substantially complied" with the applicable regulations, thus entitling the Estate, pursuant to 26 U.S.C. § 2032A(d)(3), to correct or perfect its defective election once notified by the I.R.S. In the alternative, the Estate contends that it provided "substantially all the information" required on its return with respect to the election for special use valuation, and that it was eligible under § 1421 of the Tax Reform Act of 1986 to perfect its previously defective election. We address each of the Estate's arguments.

B. *Section 2032A(d)(3)*

It is undisputed that the Estate failed to file a recapture agreement with the estate tax return. In addition, the Estate omitted several items of information from the notice of election, and failed to check the box on the portion of the tax return that asks whether the estate intends to elect special use valuation. Nevertheless, the Estate argues that it "substantially complied" with the applicable regulations in its effort to elect special use valuation, thus entitling it to correct the defects in its election pursuant to § 2032A(d)(3). We disagree, and hold that the Estate's failure to attach a recapture agreement is sufficient by

itself to preclude the requisite "substantial compliance" with the regulations.[4]

Section 2032A(d)(3) provides as follows:

> MODIFICATION OF ELECTION AND AGREEMENT TO BE PERMITTED. — The Secretary [of the Treasury] shall prescribe procedures which provide that in any case in which —
>
> (A) the executor makes an election under [26 U.S.C. § 2032A(d)(1)] within the time prescribed for filing such election, and
>
> (B) substantially complies with the regulations prescribed by the Secretary with respect to such election, but —
>
> (i) the notice of election, as filed, does not contain all required information, or
>
> (ii) signatures of 1 or more persons required to enter into the [recapture agreement] are not included on the

---

4. Because we conclude that the absence of the recapture agreement is sufficient to preclude "substantial compliance" for purposes of § 2032A(d)(3), we do not address the effect of the Estate's omission of specific items of information from the notice of election. With respect to the Estate's failure to check the "Yes" box on the portion of the return that asks whether the estate intends to elect special use valuation, *see* Part II.C., *infra*.

> agreement as filed, or the agreement does not contain all required information,
>
> the executor will have a reasonable period of time (not exceeding 90 days) after notification of such failures to provide such information or agreements.

26 U.S.C. § 2032A(d)(3). "By 'agreements' in the last line the statute evidently means an additional copy or additional copies of the agreement, containing the missing signatures." *Prussner v. United States,* 896 F.2d 218, 222 (7th Cir.1990) (en banc).

The Code does not define the phrase "substantial compliance," and no Treasury regulations defining that phrase have been enacted. "It is left to the courts to determine whether a taxpayer has substantially complied with the applicable regulations such that perfection of an election is allowed." *McAlpine v. Commissioner,* 968 F.2d 459, 461 (5th Cir.1992).

In answering the question presented — whether a taxpayer who fails to attach any kind of recapture agreement to the estate tax return has "substantially complied" with the regulations for making an election — we start with the statute itself. The language of § 2032A(d)(3)(B)(ii) allows the taxpayer to correct a defective election where the taxpayer "substantially complies with the regulations . . . with respect to [the] election, but . . . signatures of 1 or more persons required to enter into the [recapture agreement] are not included on the agreement as filed, or the agreement does not contain all required information. . . ." The foregoing language implies that the taxpayer who has submitted a recapture agreement, albeit with defects, will be

allowed to correct those defects. It does not suggest that such relief should be afforded to the taxpayer who has failed to submit any kind of recapture agreement with his or her return. *See Estate of Hudgins v. Commissioner,* 57 F.3d 1393, 1400-01 (5th Cir. 1995) (holding § 2032A(d)(3) is available for the correction of "hypertechnical glitches," not the complete failure to file a recapture agreement); *McDonald v. Commissioner,* 853 F.2d 1494, 1497-98 (8th Cir.1988) (explaining that § 2032A(d)(3) allows the taxpayer to correct "slight technical failures" in an otherwise acceptable recapture agreement).

The legislative history of the Deficit Reduction Act of 1984 also indicates that the failure to attach any kind of recapture agreement to the estate tax return precludes "substantial compliance" for purposes of § 2032A(d)(3). According to the conference report, the recapture agreement itself, as originally filed, must substantially comply with the regulations, and thus the defects subject to correction must be minor. The report states:

> [A]n agreement to the current use valuation election may be perfected under this provision provided the agreement, as filed with the estate tax return, evidences substantial compliance with the requirements of the regulations. To be eligible for perfection, the agreement as originally filed must at a minimum be valid under State law and must include the signatures of all parties having a present interest or a remainder interest other than an interest having a relatively small value. The right to perfect agreements is intended to be limited to cases where, for example, a parent of a minor

> remainderman, rather than a *guardian ad litem,* as required under State law, signs the agreement. Similarly, failure to designate an agent in the agreement as filed may be corrected under this provision.

H. R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1241, *reprinted in* 1984 U.S.Code Cong. & Admin.News 697, 1445, 1929 (footnote omitted). The complete failure to attach a recapture agreement to the estate tax return is not the type of defect contemplated by the drafters of § 2032A(d)(3).[5]

The attachment of a recapture agreement to the estate tax return is part and parcel of a valid election for special use valuation, thus leading to the conclusion that a taxpayer cannot substantially comply with the regulations for making an election without attaching a recapture agreement. *See Estate of Hudgins v. Commissioner,* 57 F.3d 1393, 1398 (5th Cir.1995) (explaining that a recapture agreement "is an integral and indispensable element of a special use valuation election"). Section 2032A(a)(1) provides that an estate may enjoy special use valuation only where "the executor elects the application of this

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5. As explained in the text below, it is clear that the Estate's total failure to attach a recapture agreement renders the Estate ineligible for the relief afforded by § 2032A(d)(3). Thus, we need not address the more difficult issues involving the effect of various deficiencies in a timely filed recapture agreement. Nor need we address the possible tension between the statutory language of § 2032A(d)(3) (implying that the filing of a signed recapture agreement might constitute substantial compliance, notwithstanding the need to obtain additional signatures) and the language of the legislative history quoted above, to the effect that the agreement as initially filed must contain signatures of all except interests of small value. *See McAlpine v. Commissioner,* 968 F.2d 459, 463 (5th Cir. 1992).

section *and filed the agreement referred to in subsection (d)(2)* [i.e., the recapture agreement] 26 U.S.C. § 2032A(a)(1)(B) (emphasis added). The Treasury regulations and the legislative history accompanying § 2032A confirm that an election for special use valuation is not valid unless a recapture agreement is submitted contemporaneously with the estate tax return. *See* 26 C.F.R. § 20.2032A-(a)(3) ("An election under this section is made by attaching to a timely filed estate tax return the agreement described in paragraph (c)(1) of this section [i.e., the recapture agreement] and a notice of election. . . ."); H.R.Rep. No. 94-1380, 94th Cong., 2d Sess. 27 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin.News 2897, 3356, 3381 ("One of the requirements for making a valid election is the filing with the estate tax return a written [recapture] agreement signed by each person in being who has an interest (whether or not in possession) in any qualified real property with respect to which the [special] use valuation is elected.").

To be valid, the recapture agreement must be executed by all parties who have any kind of property interest in the specially valued property. 26 U.S.C. § 2032A(d)(2); 26 C.F.R. § 20.2032A-8(c)(1). In the agreement, the qualified heirs to the specially valued property must express consent to personal liability for the recapture tax imposed by § 2032A(c), which is triggered by an early disposition of the property or an early cessation of the qualified use. 26 C.F.R. § 20.2032A-8(c)(1). To aid the Commissioner in collecting the recapture tax, the recapture agreement must be binding under local law on all parties with an interest in the property, and it must designate an agent for the parties with satisfactory evidence of authority to act for all parties to the agreement in dealing with the I.R.S. on matters arising under § 2032A. *Id.* § 20.2032A-8(c)(1). The personal liability of the qualified heirs through the recapture

agreement is complemented by 26 U.S.C. § 6324B, which gives the United States a lien on the specially valued real property to aid in the collection of the recapture tax. As the Fifth Circuit recently explained, the availability of a statutory lien against the property does not diminish the importance of the recapture agreement:

> Personal liability of the heirs [through the recapture agreement] enhances the likelihood that the property will be kept in the family and used for qualified purposes, and that the Commissioner would be able to recover the defaulted tax benefit if, by the time recapture is triggered, the value of the property shall have so declined that the § 6324 lien is then wholly or partially worthless. . . . The heirs' agreement to be personally liable for the tax consequences is equally indispensable, for "without the heirs' signatures, the election on the original return may not effectively bind the heirs."

Estate of Hudgins v. Commissioner, 57 F.3d 1393, 1398-99 (5th Cir.1995) (quoting *McDonald v. Commissioner,* 89 T.C. 293, 305 n. 31, 1987 WL 43888 (1987), *aff'd in part and rev'd in part,* 853 F.2d 1494 (8th Cir.1988), *cert. denied,* 490 U.S. 1005, 109 S.Ct. 1639, 104 L.Ed.2d 155 (1989)).

The foregoing explanation of the essential nature of a recapture agreement leads ineluctably to the conclusion that a taxpayer does not "substantially comply" with the requirements for electing special use valuation without submitting a recapture agreement with the return. Moreover, the case law from every

circuit court of appeals to have considered this issue, as well as the United States Tax Court, clearly supports this holding. *See Estate of Hudgins v. Commissioner,* 57 F.3d 1393, 1405 (5th Cir.1995) ("[W]e hold today that a special use valuation election can never be in substantial compliance with the requirements of § 2032A if the estate tax return in which the election is made is not accompanied by a Recapture Agreement or some reasonable facsimile thereof, signed by the holders of all interests (other than de minimis) in the qualified assets, and personally binding the interest holders under state law to be liable for tax deficiencies in the event of disqualifying use or disposition of the property during the statutory period."); *Prussner v. United States,* 896 F.2d 218, 223 (7th Cir.1990) (en banc) (holding that the failure to attach the recapture agreement to the estate tax return is a default for which § 2032A(d)(3) provides "no absolution"); *McDonald v. Commissioner,* 853 F.2d 1494, 1497-98 (8th Cir.1988) (holding that a timely-filed recapture agreement, which contained "neither the name nor the signature of anyone with an interest in the property," did not "substantially comply" with the regulations and thus could not be perfected later); *Estate of Merwin v. Commissioner,* 95 T.C. 168, 173, 1990 WL 120054 (1990) ("Failure to attach a recapture agreement, whether or not a notice of election is attached, alone precludes the requisite substantial compliance [under § 2032A(d)(3)].").

For the foregoing reasons, we hold that the Estate has not satisfied the substantial compliance provision of § 2032A(d)(3) and thus is not entitled under that section to perfect its deficient election. We now turn to the Estate's other argument.

C. *Section 1421 of the Tax Reform Act of 1986*

The Estate also contends that § 1421 of the Tax Reform Act

of 1986 (hereinafter "§ 1421") excuses its failure to submit a recapture agreement with its estate tax return Section 1421, as amended, provides as follows:

> SEC. 1421. INFORMATION NECESSARY FOR VALID SPECIAL USE VALUATION ELECTION.
>
> (a) IN GENERAL. — In the case of any decedent dying before January 1, 1986, if the executor —
>
> (1) made an election under section 2032A of the Internal Revenue Code of 1954 on the return of tax imposed by section 2001 of such Code, and
>
> (2) provided substantially all the information with respect to such election required on such return of tax,
>
> such election shall be a valid election for purposes of section 2032A of such Code.
>
> (b) EXECUTOR MUST PROVIDE INFORMATION. — An election described in subsection (a) shall not be valid if the Secretary of the Treasury or his delegate after the date of the enactment of this Act requests information from the executor with respect to such election and the executor does not provide such information within 90 days of receipt of such request.

Appendix A

Tax Reform Act of 1986, Pub.L. No. 99-514, § 1421, 100 Stat. 2085, 2716, as amended by the Technical and Miscellaneous Revenue Act of 1988, Pub.L. No. 100-647, § 1014(f), 102 Stat. 3343, 3562.

In order for a defective election to be deemed valid under § 1421(a), three conditions must be satisfied: (1) the decedent must have died before January 1, 1986; (2) the taxpayer must have "made an election" for § 2032A treatment on the estate tax return; and (3) the taxpayer must have "provided substantially all the information with respect to such election required on such return of tax." [6] In this case, the first condition has been satisfied, because the decedent died on December 15, 1985. The parties disagree, however, on whether the second and third requirements have been satisfied.

With respect to the second condition, the government argues that the Estate failed to make an election for special use valuation on its estate tax return. Indeed, the Estate failed to check the box, on page 2 of the return, which is designated for electing special use valuation. This failure to check the appropriate box, the government points out, distinguishes this case from the cases that the Estate relies upon in its brief. *See Prussner v. United States,* 896 F.2d 218, 225 (7th Cir.1990) (en banc) ("All that is required [under § 1421] . . . is the making of an election *on the estate tax return* — that is, the marking of the box for the election. The taxpayer who checks the box — that was done here — and provides substantially all the information that the return requires

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6. Notwithstanding the satisfaction of these three conditions, special use valuation may be denied if the executor of the estate fails to respond in a timely manner to a request for the missing information pursuant to § 1421(b).

with respect to the election is home free."); *Estate of Doherty v. Commissioner,* 982 F.2d 450, 456 (10th Cir.1992) (following *Prussner* and noting that the taxpayer "marked the box for the election on the estate's tax return").

We are not persuaded that the Estate's failure to mark the appropriate box on its tax return is sufficient, by itself, to preclude relief under § 1421. In this case, despite the failure to mark the box, the Estate expressed a clear intent on the estate tax return to elect special use valuation. Specifically, the Estate completed a Schedule N, which appears at page 15 of the return and is entitled "Section 2032A Valuation." A taxpayer would not complete a Schedule N unless an election for special use valuation was intended. In addition to the Schedule N. The Estate attached to its return a document entitled "Affidavit from Personal Representatives," which contained much of the information required by 26 C.F.R. § 20.2032A-8(a)(3) to be included in a § 2032A "notice of election" and which clearly indicated the Estate's intent to elect special use valuation for the real property designated on the Schedule A as Parcels 3A, 3B, and 3C. Under these circumstances, we conclude that the Estate "made an election under section 2032A" on its tax return, however awkwardly, thus satisfying the second condition for relief under § 1421.

The third condition for § 1421 relief is that the Estate must have "provided substantially all the information with respect to such election required on such return of tax." § 1421(a)(2). The government argues that the Estate failed to provide substantially all of the required "information" because it failed to submit a recapture agreement with its return.[7] The Estate, on the other

7. In addition to omitting the recapture agreement, the Estate also omitted certain items of information from its notice of election. *See supra*

(Cont'd)

hand, contends that a recapture agreement does not constitute "information" for purposes of § 1421(a)(2). We confront a split of authority on the issue of whether the phrase "information with respect to such election required on such return of tax," as used in § 1421(a)(2), includes the recapture agreement. *Compare Prussner v. United States,* 896 F.2d 218, 225-28 (7th Cir.1990) (en banc)[8]

(Cont'd)
note 3. However, the government apparently concedes that, with the exception of the omitted recapture agreement, the Estate provided "substantially all the information" required on the estate tax return with respect to the § 2032A election.

8. The Tenth Circuit, in *Estate of Doherty v. Commissioner,* 982 F.2d 450, 456-57 (10th Cir. 1992), indicated that it was "greatly persuaded by the rationale of *Prussner.*" *Id.* at 456. Although this dicta in *Doherty* indicates approval of the *Prussner* rationale, the holding in *Doherty* is not necessarily inconsistent with the holding of this opinion. *Doherty* involved a taxpayer who failed to attach to the estate tax return a previously obtained appraisal of the fair market value of the property sought to be specially valued. *Id.* at 455. The face of the Form 706 in *Doherty* apparently did not direct the taxpayer to include the missing appraisal. *Id.* at 451-52. By contrast, in the instant case (and in *Prussner*), the face of the Form 706 directs the taxpayer to attach a recapture agreement.

Although the face of the Form 706 in *Doherty* did not alert the taxpayer that an appraisal had to be attached, the instructions accompanying the Form 706 clearly directed the taxpayer to attach "copies of written appraisals of the fair market value of the real property." Thus, *Doherty* stands for the proposition that a taxpayer who fails to follow the instructions accompanying Form 706 is nevertheless entitled to relief under § 1421. In the instant case, because the face of the Form 706 directs the taxpayer to attach a recapture agreement, we need not decide whether the failure to provide substantially all the information elicited by the separate instructions accompanying the return precludes relief under § 1421. Accordingly, we express no opinion on that particular issue.

with Estate of Merwin v. Commissioner, 95 T.C. 168, 181, 1990 WL 120054 (1990).[9]

As in any case of statutory interpretation, we start with the language of the statute itself. *See Kelly v. Robinson,* 479 U.S. 36, 43, 107 S.Ct. 353, 357, 93 L.Ed.2d 216 (1986). In our opinion, the ordinary meaning of the word "information," in the context of the phrase "information with respect to such election required on such return," § 1421(a)(2), is broad enough to include the recapture agreement.[10] As consultation with dictionaries confirms, the word "information" can encompass a broad range of meaning. The language of the statutory phrase, "information with respect to such election," elaborates the scope of the meaning in this context, i.e., information *with respect to such election.* Clearly, the statute at this point is referring to the data which the statute and regulations indicate are necessary for the election. The recapture agreement is one such item, indeed a significant one. *See Estate of Merwin v. Commissioner,* 95 T.C. 168, 182, 1990 WL 120054 (1990) (explaining that the word

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9. The Eighth Circuit, in *McDonald v. Commissioner,* 853 F.2d 1494 (8th Cir. 1988), *cert. denied,* 490 U.S. 1005, 109 S.Ct. 1639, 104 L.Ed.2d 155 (1989), employed an interpretation of § 1421 different from that of *Merwin* or our opinion in this case, *McDonald* indicated that § 1421 requires substantial compliance with the separate instructions accompanying Form 706, with no discussion of the relevance of the directions on the return form itself, although its facts may not have required a holding of that breadth. *Accord Foss v. United States,* 865 F.2d 178 (8th Cir. 1989). As noted in note 8, *supra,* we express no opinion on the effect of the taxpayer's failure to comply with the separate instructions accompanying Form 706.

10. We recognize that the Seventh Circuit in *Prussner v. United States,* 896 F.2d 218, 226-28 (7th Cir. 1990) (en banc) is contra. For the reasons discussed below, we respectfully disagree with the *Prussner* interpretation.

"information" includes "everything that section 2032A and the corresponding regulations require for a valid election," including a recapture agreement). The statutory language then specifies the portion of that broader range of items (i.e., those necessary for the election) that the taxpayer must provide, i.e., those items "required on such return." In the instant case, the return form specially directed that the "required agreements" be attached.

Our interpretation finds strong support in the structure of the statute. The very next subsection of this same 1986 statute, § 1421(b), also uses the word "information" in a manner that undoubtedly contemplates the inclusion of recapture agreements.[11] Section 1421(b) provides that "[a]n election described in subsection (a) shall not be valid if the Secretary . . . requests *information* from the executor with respect to such election and the executor does not provide such *information* within 90 days of receipt of such request." (Emphasis added). Clearly, as used in § 1421(b), Congress intended the phrase "information" to include a recapture agreement. As noted above, the recapture agreement is an essential ingredient for a valid election; it is unreasonable to suppose that Congress was not contemplating in § 1421(b) that the Secretary could request information including the recapture agreement. *Accord Merwin,* 95 T.C. at 182.

Our interpretation is confirmed by the legislative history of § 1421. Apparently, the face of the June 1982 version of Form

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11. It is true that in a related statute, I.R.C. § 2032A(d)(3), the statutory language more precisely uses both the term "information" and the term "agreement." *See Prussner,* 896 F.2d at 228. However, we find more persuasive the use of the word "information" in a broader, inclusive sense in the *very next subsection of the same 1986 Act.*

706 failed to specify the requirement of filing the recapture agreement with the return. As a result, many taxpayers who had used that version of the Form 706 failed to submit recapture agreements, and were denied special use valuation. The conference report accompanying § 1421 explains:

> The Senate amendment provides that estates of individuals dying before January 1, 1986, that substantially complied with the requirements enumerated on the Federal Estate Tax Return (as opposed to Treasury Department regulations) are allowed to perfect defective elections within 90 days of being notified of errors by the Treasury. Specifically, the March 1982 edition of Form 706, Federal Estate Tax Return, did not specify that the required agreement had to be submitted with the estate tax return. This provision, therefore, permits late filing of the required agreements for estates that used the March 1982 version of Form 706.

H.R.Conf.Rep. No. 841, 99th Cong., 2d Sess. II-770-71 (1986), *reprinted in* 1986 U.S.Code Cong. & Admin.News 4076, 4858-59. Although the legislative history refers to the "March 1982" version of Form 706, Congress in fact meant to refer to the June 1982 version. *Prussner,* 896 F.2d at 226; *Merwin,* 95 T.C. at 178. Running throughout the legislative history is the indication that the purpose of the statute was to permit later perfection of the election by a taxpayer who could have been misled by an absence of information on the tax return, i.e., where the taxpayer has substantially complied with the requirements enumerated on the return. Thus, the report of the Senate Finance Committee states:

Appendix A

Reasons for Change

The committee is concerned that, in certain cases, the Federal estate tax return (Form 706) provided by the Treasury Department for filing estate tax returns did not sufficiently inform taxpayers of what information must be provided to elect current use valuation and that an agreement to the election is required to be attached to Form 706. The committee determined, therefore, that limited relief permitting taxpayers additional time to supply information is appropriate *where taxpayers could have been misled by an absence of information on Form 706.*

Explanation of Provision

The bill provides that, if an estate . . . provided substantially all the information *elicited by Form 706,* . . . the election is valid if the estate provides . . . additional information necessary to perfect the election. . . . (This provision permits notices of election and [recapture] agreements to the election to be filed late where the estate timely filed those documents *to the extent requested and described on Form 706.*)

S.Rep. No. 313, 99th Cong. 2d Sess. (1986) (Emphasis added).

Despite the clear indication in the legislative history, and

indeed the statute itself, that the purpose of the statute was to permit later perfection by taxpayers who "substantially complied with the requirements enumerated" on the return (i.e., those who timely filed those documents to the extent requested on the return), the *Prussner* court would apparently permit later perfection by taxpayers who merely checked the election box on the return. The *Prussner* court gave two reasons for its holding: its view that a recapture agreement is not "information" in the ordinary sense of the word; and the fact that the recapture agreement is attached to the return rather than written out "on" the return. *Id.*, 896 F.2d at 225-26.

We disagree with *Prussner*'s reading of the statute. As noted above, we believe that the word "information," as used in § 1421(a)(2), is broad enough to include the recapture agreement.[12] Moreover, we think that *Prussner* erred in relying on the technicality that the recapture agreement is attached to the tax return, as opposed to being "on" the return itself. The text of § 1421(a)(2) requires that the taxpayer shall have "provided substantially all the information . . . required on such return of tax." The Seventh Circuit interpreted the phrase "required on such return of tax" as referring to the location where the taxpayer supplies the relevant information, and thus held that the substantial compliance provision of § 1421(a)(2) does not apply to documents that must be attached to the return. We respectfully suggest that *Prussner*'s *is* a technical interpretation of the statutory language, which misses its true import. To be eligible to perfect the return, the statute requires that the taxpayer

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12. The broad definition of "information" in the dictionaries belies the suggestion in *Prussner*, 896 F.2d at 226, that the word "information" cannot include a report of a commitment. The definition in the various dictionaries is inconsistent with the *Prussner* notion that the term is limited in meaning to inert data with no real life consequences.

must have "provided substantially all the information . . . required on such return." The most reasonable reading of the statutory language is that the phrase "required on such return" refers to the word "information." Thus, the taxpayer must have provided — whether written in the spaces provided on the return or attached to the return — the "information," or substantially all of it, which the return directs should be provided.

We respectfully suggest that the *Prussner* court inappropriately watered down the statutory requirement of substantial compliance by relying upon an unduly narrow interpretation of the statutory term "information" and a technical construction of the statutory phrase "required on such return of tax," and by failing to accord proper significance to the legislative history and to the fact that Congress in the same 1986 Act, in the very next subsection (i.e., § 1421(b)), employed the same term "information" in a context which clearly encompasses the recapture agreement.[13]

The Tax Court in *Estate of Merwin v. Commissioner,* 95 T.C. 168, 1990 WL 120054 (1990), rejected the *Prussner* court's interpretation for the same reasons that we do. *Merwin* concluded that the phrase "required on such return" means "requested by the face of Form 706." *Id.* at 179. Thus, if the taxpayer uses a version of Form 706 that on is face requests a recapture agreement, then he recapture agreement constitutes "information" required to satisfy the substantial compliance

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13. We need not and do not address another holding of the *Prussner* court, i.e., its rejection of the I.R.S. argument that the relief afforded by the 1986 Act is limited to those taxpayers who filed their returns on the June 1982 version of Form 706. Moreover, as indicated in our discussion in Part II.B., we agree with the *Prussner* holding with respect to I.R.C. § 2032A(d)(3).

language of § 1421(a)(2). The Tax Court supported this interpretation of the statute by quoting from the legislative history noted above.

Under *Merwin*'s interpretation of § 1421, the estate's initial return need not include a recapture agreement if the face of Form 706 makes no reference to a required "agreement" or to specific instructions describing a recapture agreement. *Id.* 95 T.C. at 179. Thus, a taxpayer who used the June 1982 version of Form 706 would have provided "substantially all the information . . . required on such return of tax" even if a recapture agreement had not been attached. However, consistent with the statutory language and legislative history quoted above, a different rule applies to taxpayers who use nonmisleading versions of the Form 706:

> In contrast to the June 1982 version of Form 706, if the face of the applicable Form 706 refers expressly to a required 'agreement' or to specific instructions that describe a recapture agreement, Congress appears to have intended the 'information with respect to such election required on such return of tax' to expand accordingly. . . . An estate will then satisfy section 1421(a)(2) only if it provides substantially all of the expanded information base. The reason the estate should be held to a higher level of compliance under these circumstances is that the face of the Form 706 is sufficient to alert the estate to additional requirements, and misled taxpayers were the exclusive congressional concern underlying section 1421. . . .

Merwin, 95 T.C. at 180.

We find *Merwin* persuasive. We hold that the word "information," as used in § 1421(a)(2), includes the recapture agreement in this case, where the face of the applicable Form 706 refers to the "required agreements." The instant case involves the March 1985 version of Form 706, not the June 1982 version addressed in the legislative history. Unlike the June 1982 version of Form 706 (the face of which makes no reference to a required "agreement" nor to the applicable parts of the instructions), the face of the March 1985 form tells the taxpayer that a recapture agreement must be attached to the return. Specifically, line 2 (on page 2) asks the taxpayer: "Do you elect special use valuation?" Immediately below this question, the March 1985 form states: "If 'Yes,' complete and attach Schedule N and the agreements required by the instructions to Schedule N." Similarly, Schedule N, which is part of the return, directs the taxpayer: "Enter the requested information for each party who received any interest in the specially valued property. Also complete and attach the required agreements described in the Instructions." Because these references appear on the face of the March 1985 version of Form 706, we conclude in this case that a recapture agreement constitutes "information with respect to such election required on such return of tax" for purposes of § 1421(a)(2).[14]

In order to take advantage of § 1421, the taxpayer must have provided "substantially all" of the "information" requested by the tax return. In light of our earlier discussion of the importance of the recapture agreement, and in light of our holding

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14. In this case, because the Form 706 itself expressly referred to the required agreements, we need not address issues involving a different version of the form with perhaps less specific reference (e.g., incorporation of directions in the instructions which accompany the return) to the omitted information. *See supra* notes 8 & 9.

that the omission of a recapture agreement precludes "substantial compliance" with the requirements for electing special use valuation for purposes of § 2032A(d)(3), we readily conclude that the Estate in this case failed to provide "substantially all the information . . . required on such return of tax" within the meaning of § 1421(a)(2).

III. CONCLUSION

For all the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED OCTOBER 23, 1996

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2370

D.C. Docket No. 91-622-CIV-T-25A

IN RE: ESTATE OF CHARLES R. LUCAS, Deceased,

Plaintiff,

ROY H. LUCAS; HOWARD C. LUCAS, Co-Personal Representatives of the Estate of Charles R. Lucas,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

Before HATCHETT, Circuit Judge, ANDERSON, Circuit Judge, and WOOD*, Senior Circuit Judge.

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* Honorable Harlington Wood, Jr., Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Appendix B

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiffs-appellants pay defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

Entered: October 23, 1996
For the Court: Miguel J. Cortez, Clerk

s/ Karleu McNabb
Deputy Clerk

ISSUED AS MANDATE: 12/16/96

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA FILED FEBRUARY 23, 1995

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 91-622-Civ-T-25A

ROY H. LUCAS and HOWARD C. LUCAS, Co-Personal Representatives of the Estate of Charles R. Lucas,

v.

UNITED STATES OF AMERICA

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Judgment, as a matter of law, is entered for the Defendant and against Plaintiffs.

February 23, 1995
Date

DAVID L. EDWARDS
Clerk

s/ C. Backmann
Deputy Clerk

APPENDIX D — AMENDED COMPLAINT

THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Case No. 91-622-CIV-T-15A

In Re:

CHARLES R. LUCAS, Deceased.

ROY H. LUCAS AND HOWARD C. LUCAS, Co-Personal Representatives of the Estate of Charles R. Lucas,

Plaintiffs,

vs.

The United States of America,

Defendant.

AMENDED COMPLAINT TO RECOVER ESTATE TAX PAID

COME NOW the Co-Personal Representatives of the above-entitled estate, by and through their undersigned attorney, and allege as follow:

1. This action arises in the provisions of §1346 and §1402, Title 28 U.S. Code. Plaintiffs are citizens of the United States and residents of the state of Florida.

2. This claim is to recover from the United States of America an overpayment of Federal Estate Taxes illegally

assessed against and collected from Plaintiffs for the filing of the Federal Estate Tax Return on the Estate of Charles R. Lucas.

3. On December 15, 1985, Mr. Charles R. Lucas died, and Plaintiffs timely filed a Federal Estate Tax Return.

4. Plaintiffs did thereafter timely pay the full amount of tax shown to be due on said return.

5. Upon examination of that said return, a deficiency was assessed for the Federal Estate Tax Return, which deficiency was caused by the Federal Government disallowing the Estate of Charles R. Lucas to utilize the provisions of §2032(a) of the 1954 Internal Revenue Code as amended.

6. The Plaintiffs established that the estate was entitled to the provisions of §2032(a) of the 1954 Internal Revenue Code as amended, however, the Internal Revenue Service disallowed said claim due to the method and mode of the election, emphasizing the importance of form over matter. The legislative history and subsequent cases show this not to be the fact, and that Congress did desire taxpayers such as the Estate of Charles R. Lucas to benefit by the provision of the Internal Revenue Code.

7. Plaintiffs will show that the Preparer charged with filling out the 706 Federal Estate Tax Return did contract cancer and was severely and seriously ill at the time the election was made, the 706 was prepared and Federal Estate Taxes paid.

8. Plaintiffs aver further, that in determining the Federal Estate Tax Liability for the Estate of Charles R. Lucas, they were entitled under the Internal Revenue Laws of the United

Appendix D

States to compute the adjusted gross Estate by utilizing the provisions of §2032(a) of the Internal Revenue Code of 1954 as amended, which would permit a substantial devaluation of the amount of the Estate up to and including $750,000.00. All tests before §2032(a) were met except for the matter of form over matter.

9. Plaintiffs did file a claim for refund in the amount of $87,131.00, on or about June 26, 1989.

10. This claim was rejected on March 26, 1990. A copy of said denial for the claimed refund is attached hereto and incorporated by reference thereto.

11. Plaintiffs demand trial by jury of all issues so triable.

WHEREFORE, the premises considered, Plaintiffs claim of the Defendant the sum of $87,131.00 plus interest paid thereon and interest before a period from the date of payment of said tax, together with interest thereon provided by law and any interest refunds paid on said amounts, the costs and disbursements of this action and such additional sums or further relief as this Honorable Court may deem equitable and proper in considering the exigencies of the case.

s/ J. David Pobjecky,
J. David Pobjecky, Esq.
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APPENDIX E — ANSWER

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 91-622-CIV-T-15A

ROY H. LUCAS AND HOWARD C. LUCAS, Co-Personal Representatives of the Estate of Charles R. Lucas,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ANSWER

COMES NOW the defendant, United States of America, by and through counsel, Robert W. Genzman, United States Attorney for the Middle District of Florida, and for its answer to plaintiffs' amended complaint alleges as follows:

FIRST DEFENSE

The amended complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

In further answer to the specific numbered paragraphs of the amended complaint, defendant admits, denies, and alleges as follows:

Appendix E

1. Defendant admits that this Court has jurisdiction over this action against the United States, but lacks sufficient knowledge to admit or deny the remaining allegations contained in paragraph one.

APPENDIX F -- RELEVANT STATUTES AND REGULATIONS

Section 1421 of the Tax Reform Act of 1986 (26 U.S.C. § 2032):

SEC. 1421. INFORMATION NECESSARY FOR VALID SPECIAL USE VALUATION ELECTION.

(a) IN GENERAL. — In the case of any decedent dying before January 1, 1986, if the executor —

(1) made an election under section 2032A of the Internal Revenue Code of 1954 on the return of tax imposed by section 2001 of such Code, and

(2) provided substantially all the information with respect to such election required on such return of tax,

such election shall be valid election for purposes of section 2032A of such Code.

(b) EXECUTOR MUST PROVIDE INFORMATION. — An election described in subsection (a) shall not be valid if the Secretary of the Treasury or his delegate after the date of the enactment of this Act requests information from the executor with respect to such election and the executor does not provide such information within 90 days of receipt of such request.

Tax Reform Act of 1986, Pub. L. No. 99-514, § 1421, 100 Stat. 2085, 2716, as amended by the Technical and Miscellaneous Revenue Act of 1988, Pub.L. No. 100-647, § 1014(f), 102 Stat. 3343, 3562.

Appendix F

Internal Revenue Code of 1986 (26 U.S.C.):

SEC. 2032A. VALUATION OF CERTAIN FARM, ETC. REAL PROPERTY.

(a) *Value based on Use Under Which Property Qualifies.*—

(1) *General Rule.* — If —

(A) the decedent was (at the time of his death) a citizen or resident of the United States, and

(B) the executor elects the application of this section and files the agreement referred to in subsection (d) (2),

then, for purposes of this chapter, the value of qualified real property shall be its value for the use under which it qualifies, under subsection (b), as qualified real property.

* * *

(b) *Qualified Real Property.* —

(1) *In general.*— For purposes of this section, the term "qualified real property" means real property located in the United States which was acquired from or passed from the decedent to a qualified heir of the decedent and which, on the date of the decedent's death was being used for a qualified use by the decedent or a member of the decedent's family, but only if —

(A) 50 percent or more of the adjusted value of the gross estate consists of the adjusted value of real or personal property which —

(i) on the date of the decedent's death, was being used for a qualified use by the decedent or a member of the decedent's family, and

(ii) was acquired from or passed from the decedent to a qualified heir of the decedent.

(B) 25 percent or more of the adjusted value of the gross estate consists of the adjusted value of real property which meets the requirements of subparagraphs (A) (ii) and (C),

(C) during the 8-year period ending on the date of the decedent's death there have been periods aggregating 5 years or more during which —

(i) such real property was owned by the decedent or a member of the decedent's family and used for a qualified use by the decedent or a member of the decedent's family, and

(ii) there was material participation by the decedent or a member of the decedent's family in the operation of the farm or other business, and

(D) such real property is designated in the agreement referred to in subsection (d)(2).

(2) *Qualified use.*— For purposes of this section, the term "qualified use" means the devotion of the property to any of the following:

(A) use as a farm for farming purposes, or

(B) use in trade or business other than the trade or business of farming.

* * *

(c) *Tax Treatment of Dispositions and Failures to Use for Qualified Use.* —

(1) *Imposition of additional estate tax.* — If, within 10 years after the decedent's death and before the death of the qualified heir —

(A) the qualified heir disposes of any interest in qualified real property (other than by a disposition to a member of his family), or

(B) the qualified heir ceases to use for the qualified use the qualified real property which was acquired (or passed) from the decedent, then there is hereby imposed an additional estate tax.

(2) *Amount of additional tax.* —

(A) *In general.* — The amount of the additional tax imposed by paragraph (1) with respect to any interest shall be the amount equal to the lesser of —

(i) the adjusted tax difference attributable to such interest, or

(ii) the excess of the amount realized with respect

to the interest (or, in any case other than a sale or exchange at arm's length, the fair market value of the interest) over the value of the interest determined under subsection (a).

* * *

(6) *Cessation of qualified use.* — For purposes of paragraph (1)(B), real property shall cease to be used for the qualified use it —

(A) such property ceased to be used for the qualified use set forth in subparagraph (a) or (B) of subsection (b)(2) under which the property qualified under subsection (b), or

(B) during any period of 8 years ending after the date of the decedent's death and before the date of the death of the qualified heir, there had been periods aggregating more than 3 years during which —

(i) in the case of periods during which the property was held by the decedent, there was no material participation by the decedent or any member of his family in the operation of the farm or other business, and

(ii) in the case of periods during which the property was held by any qualified heir, there was no material participation by such qualified heir or any member of his family in the operation of the farm or other business.

* * *

Appendix F

(d) *Election; Agreement.* —

(1) [As amended by Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172, 312-313, § 421(j)]

Election. — The election under this section shall be made on the return of the tax imposed by section 2001. Such election shall be made in such manner as the Secretary shall by regulations prescribe. Such an election, once made, shall be irrevocable.

(2) *Agreement.* — The agreement referred to in this paragraph is a written agreement signed by each person in being who has an interest (whether or not in possession) in any property designated in such agreement consenting to the application of subsection (c) with respect to such property.

(3) [As added by Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1030, § 1025(a)]

Modification of election and agreement to be permitted. — The Secretary shall prescribe procedures which provide in that in any case in which —

(A) the executor makes an election under paragraph (1) within the time prescribed for filing such election, and

(B) substantially complies with the regulations prescribed by the Secretary with respect to such election, but —

(i) the notice of election, as filed, does not contain all required information, or

(ii) signatures of 1 or more persons required to enter into the agreement described in paragraph (2) are not included on the agreement as filed, or the agreement does not contain all required information,

the executor will have a reasonable period of time (not exceeding 90 days) after notification of such failures to provide such information or agreements.

* * *

SEC. 6324B. SPECIAL LIEN FOR ADDITIONAL ESTATE TAX ATTRIBUTABLE TO FARM, ETC., VALUATION.

(a) *General Rule.* — In the case of any interest in qualified real property (within the meaning of section 2032A(b)), an amount equal to the adjusted tax difference attributable to such interest (within the meaning of section 2032A(c)(2)(B)) shall be a lien in favor of the United States on the property in which such interest exists.

(b) [as amended by Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763, 2939, § 702(r)(4)] *Period of lien.* — The lien imposed by this section shall arise at the time an election is filed under Section 2032A and shall continue with respect to any interest in the qualified real property —

(1) until the liability for tax under subsection (c) of section 2032A with respect to such interest has been satisfied or has become unenforceable by reason of lapse of time, or

(2) until it is established to the satisfaction of the Secretary that no further tax liability may arise under Section 2032A(c) with respect to such interest.

* * *

Treasury Regulations on Estate Tax (26 C.F.R.):

§ 20.2032A-8 *Election and agreement to have certain property valued under section 2032A for estate tax purposes.* —

(a) *Election of special use valuation* —

(1) *In general.* An election under section 2032A is made as prescribed in paragraph (a)(3) of this section and on Form 706, United States Estate Tax Return. Once made, this election is irrevocable; however, see paragraph (d) of this section for a special rule for estates for which elections are made on or before August 30, 1980.

* * *

(3) *Time and manner of making election.* An election under this section is made by attaching to a timely filed estate tax return the agreement described in paragraph (c)(2) of this section and a notice of election which contain the following information:

(i) The decedent's name and taxpayer identification number as they appear on the estate tax return;

(ii) The relevant qualified use;

(iii) The items of real property shown on the estate tax return to be specially valued pursuant to the election (identified by schedule and item number);

(iv) The fair market value of the real property to be specially valued under section 2032A and its value based on its qualified use (both values determined without regard to the adjustments provided by section 2032A(b)(3)(B);

(v) The adjusted value (as defined in section 2032A(b)(3)(B)) of all real property which is used in a qualified use and which passes from the decedent to a qualified heir and the adjusted value of all real property to be specially valued;

(vi) The items of personal property shown on the estate tax return that pass from the decedent to a qualified heir and are used in a qualified use under Section 2032A (identified by schedule and item Number) and the total value of such personal property adjusted as provided under section 2032A(b)(3)(B);

(vii) The adjusted value of the gross estate, as defined in section 2032A(b)(3)(A);

(viii) The method used in determining the special value based on use;

(ix) Copies of written appraisals of the fair market value of the real property;

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(x) A statement that the decedent and/or a member of his or her family has owned all specially valued real property for at least 5 years of the 8 years immediately preceding the date of the decedent's death;

(xi) Any periods during the 8-year period preceding the date of the decedents death during which the decedent or a member of his or her family did not own the property, use it in a qualified use, or materially participate in the operation of the farm or other business within the meaning of Section 2032A(e)(6);

(xii) The name, address, taxpayer identification number, and relationship to the decedent of each person taking an interest in each item of specially valued property, and the value of the property interests passing to each such person based on both fair market value and the qualified use;

(xiii) Affidavits describing the activities constituting material participation and the identity of the material participant or participants; and

(xiv) A legal description of the specially valued property. If neither an election or a protective election is timely made, special use valuation is not available to the estate. See sections 2032A(d)(l), 6075(a) and 6081(a).

* * *

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(c) *Agreement to special valuation by persons with an interest in property —*

(1) *In general.* — The agreement required under section 2032A(a)(l)(B) and (d)(2) must be executed by all parties who have any interest in the property being valued based on its qualified use as of the date of the decedent's death. In the case of a qualified heir, the agreement must express consent to personal liability under section 2032A(c) in the event of certain early dispositions of the property or early cessation of the qualified use. See section 2032A(c)(6). In the case of parties (other than qualified heirs) with interests in the property, the agreement must express consent to collection of any additional estate tax imposed under section 2032A(c) from the qualified property. The agreement is to be in a form that is binding on all parties having an interest in the property. It must designate an agent with satisfactory evidence of authority to act for the parties to the agreement in all dealings with the Internal Revenue Service on matters arising under section 2032A and must indicate the address of the agent.

(2) *Persons having an interest in the designated property.* An interest in property is an interest which, as of the date of the decedents death, can be asserted under applicable local law so as to affect the disposition of the specially valued property by the estate. Any person in being at the death of the decedent who has any such interest in the property, whether present or future, or vested or contingent, must enter into the agreement. Included among such persons are owners of remainder and executory interests, the holders of general or special powers of appointment, beneficiaries of a gift over in default of the

exercise of any such power, co-tenants, joint tenants and holders of other undivided interests in the property when the decedent held only a joint or undivided interest in the property or when only an undivided interest is specially valued, and trustees of trusts holding any interest in the property. An heir who has the power under local law to caveat (challenge) a will and thereby affect disposition of the property is not, however, considered to be a person with an interest in the property under section 2032A solely by reason of that right. Likewise, creditors of an estate are not such persons solely by reason of their status as creditors.

(3) *Consent on behalf of interested party.* If any person required to enter into the agreement provided for by paragraph (c)(1) either desires that an agent act for him or her or cannot legally bind himself or herself due to infancy or other incompetency, or to death before the election under section 2032A is timely exercised, a representative authorized under local law to bind such person in an agreement of this nature is permitted to sign the agreement on his or her behalf.

* * *

Supreme Court, U.S.
FILED
MAR 19 1997
CLERK

(2)

No. 96-1157

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROY H. LUCAS AND HOWARD C. LUCAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an election of special use valuation of farm property under Section 2032A of the Internal Revenue Code that is invalid—because the estate failed to attach a "recapture agreement" to the estate tax return—may be perfected by an untimely submission of the required recapture agreement.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.1a-29a) is reported at 97 F.3d 1401. The district court did not issue an opinion.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a-31a) was entered on October 23, 1996. The petition for a writ of certiorari was filed on January 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Charles R. Lucas died on December 15, 1985, leaving certain farm lands to his sons. His sons are

the personal representatives of his estate and the petitioners in this estate tax case (Pet. App. 2a).

The federal estate tax return for Mr. Lucas was timely filed with the Internal Revenue Service on October 16, 1986. In that return, the estate took the position that the farm land is "qualified real property" that, under Section 2032A(b) of the Internal Revenue Code, 26 U.S.C. 2032A(b), is eligible for what is known as a "special use valuation."[1] The estate did not check the box on the estate tax return that indicates that a "special use valuation" has been elected. The estate did, however, submit a notice of "special use valuation" with the return. That notice contained most, but not all, of the information required by the return. In particular, the estate did not attach to the return what is known as a "recapture agreement." A "recapture agreement," which is required whenever a "special use valuation"

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[1] Section 2032A provides a limited exception to the general rule that property is valued for estate tax purposes at its fair market value on the date of the decedent's death. If the estate elects Section 2032A treatment, and if the property will continue to be used by the family for a "qualified use" as a family farm or business for a specified number of years (26 U.S.C. 2032A(b)(2)), the estate is permitted to value qualified real estate at its value for that qualified use, rather than at its fair market value. The purpose of Section 2032A is to grant relief to the heirs of family farms—for valuing inherited farm land at its highest and best use (such as for real estate development) could produce such a large estate tax liability that the heirs would be required to sell the property in order to pay the tax. See H.R. Rep. No. 1380, 94th Cong., 2d Sess. 21-22 (1976). If the property ceases to be used by the family for a qualified use during the specified period, the estate tax saved by means of the special use election is to be "recaptured" from the decedent's heirs. 26 U.S.C. 2032A(c)(1)(B).

is sought, is an undertaking by the decedent's heirs to pay the additional estate taxes that would be due in the event the farm land ceased within 10 years of the decedent's death to be used for a qualified purpose (Pet. App. 2a-5a). See note 1, *supra*.

On audit, the Internal Revenue Service advised the estate that its "special use valuation" election was invalid under Section 2032A because the required recapture agreement was not provided with the estate tax return. Within ninety days of this notification from the Service, the estate submitted a fully executed recapture agreement. The Service determined, however, that the estate's defective election could not be perfected because its initial submission was not in substantial compliance with the requirements of the applicable regulations and did not provide substantially all the required information (Pet. App. 5a).[2]

2. The estate paid the resulting assessment and filed an administrative claim for a refund. When the claim was denied, petitioners brought this refund suit in district court and demanded a jury trial. At the close of evidence at the trial, the court awarded judg-

---

[2] Under Section 2032A(d)(3), an election for special use valuation that is deficient in certain respects, but which substantially complies with the requirements of the regulations, may be perfected within 90 days after the estate receives notification from the Service of the defects in its election. 26 U.S.C. 2032A(d)(3). For the estates of decedents who died before January 1, 1986, Section 1421 of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2716, provides a special transitional rule that deems valid any election for special use valuation that "provided substantially all the information with respect to such election required on such return of tax" (*ibid.*).

ment to the government as a matter of law (Pet. App. 32a).

3. The court of appeals affirmed (Pet. App. 1a-31a). The court rejected petitioners' contention that the estate had "substantially complied" with the applicable regulations and was therefore entitled to correct the defects in its election pursuant to Section 2032A(d)(3). See note 2, *supra*. The court noted that, for a defective election to be cured under Section 2032A(d)(3), the original election must have substantially complied with the requirements of the regulations. In particular, the original election must have met the requirement that the estate submit a "recapture agreement" with its return (Pet. App. 11a-12a). The court held that a taxpayer cannot substantially comply with the regulations for making an election without attaching a recapture agreement because the recapture agreement is "part and parcel of a valid election" (*id.* at 13a). The court explained that "[t]he complete failure to attach a recapture agreement to the estate tax return is not the type of defect contemplated by the drafters of § 2032A(d)(3)" (*ibid.*). The court concluded that "the essential nature of the recapture agreement leads ineluctably to the conclusion that a taxpayer does not 'substantially comply' with the requirements for electing special use valuation without submitting a recapture agreement with the return" (*id.* at 15a).

The court of appeals also rejected petitioners' argument that the estate was entitled to perfect its election under Section 1421 of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2716. That statute permits a defective election to be perfected for an estate of a decedent who died before January 1, 1986, if the estate's initial filing furnished "substantially all

the information with respect to such election required on such return of tax" (*ibid.*). The court concluded that the phrase "information . . . required on such return" includes the "recapture agreement" that must be attached to the return (Pet. App. 27a-28a).

The court disagreed with the contrary interpretation of the statute adopted by the Seventh Circuit in *Prussner* v. *United States*, 896 F.2d 218 (1990) (*en banc*). The court explained that the Seventh Circuit's conclusion that a recapture agreement is not "information . . . required on such return" missed the critical point that the recapture agreement is "information" required on the return, even if the agreement itself is attached to (and not "on") the return (Pet. App. 25a). The court of appeals noted that the requirement of a recapture agreement appears on the face of the estate tax return filed by the estate in this case and concluded that the "recapture agreement constitutes 'information with respect to such election required on such return of tax' for purposes of § 1421(a)(2)" (*id.* at 28a).

ARGUMENT

The court of appeals correctly held that the estate did not validly cure its defective election of a special use valuation. The holding of the court of appeals that the estate is not eligible for relief under Section 2032A(d)(3) does not conflict with any decision of this Court or any other court of appeals. And, while the court's further holding that the estate was not eligible for relief under Section 1421 of the Tax Reform Act of 1986 conflicts with the decision of the Seventh Circuit in *Prussner* v. *United States*, 896 F.2d 218 (1990), that conflict lacks recurring importance for it

involves the scope of a transitional rule that has application only to the estates of decedents who died before January 1, 1986. Further review is therefore not warranted.

1. a. Section 2032A of the Internal Revenue Code provides a substantial tax benefit to the heirs of certain types of real property. It permits an estate to elect to value qualifying real estate (such as farm or ranch land) for estate tax purposes based upon the actual and intended use of the property as a family business, rather than upon its highest and best use. See note 1, *supra*. Several conditions must be satisfied for the property to qualify for this favorable tax treatment.

Section 2032A and 26 C.F.R. 20.2032A-8(a)(3) establish the procedures that must be followed to make a valid election for special use valuation. They require the executor to file, as part of a timely estate tax return, (i) a notice of election that identifies all persons who have interests in the specially valued property and (ii) an agreement under which each of the heirs consents to liablility for the recapture of the special estate tax benefits in the event that a premature disposition of the property or a cessation of its qualified use occurs within a specified period. See 26 U.S.C. 2032A(c)(1)(B); 26 C.F.R. 20.2032A-8(c)(1); *Estate of Hudgins* v. *Commissioner*, 57 F.3d 1393, 1398-1399 (5th Cir. 1995); note 1, *supra*.

Under Section 2032A(d)(3), a defective election may be perfected later only if the initial election, though defective in minor respects, was in "substantial compliance" with the requirements of the applicable regulations. 26 U.S.C. 2032A(d)(3). The legislative history of this provison states that "[b]oth a notice of election and an agreement that themselves evidence

substantial compliance with the requirements of the regulations must be included with the estate tax return, as filed, if the estate is to be permitted to perfect its election." H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1241 (1984). To be valid under the regulations, a recapture agreement must be in a form that is binding under local law and must be executed by all parties with interests in the property as of the decedent's death. The heirs must expressly consent to personal liability for the recapture of the special benefits in the event that a premature disposition of the property or a cessation of its qualified use occurs. See 26 C.F.R. 20.2032A-8(c). As the Conference Report further specifies (H.R. Conf. Rep. No. 861, *supra*, at 1241):

> To be eligible for perfection, the agreement as originally filed must at a minimum be valid under State law and must include the signatures of all parties having a present interest or a remainder interest other than an interest having a relatively small value.

b. The court of appeals correctly held that the estate was not eligible to perfect its defective special use valuation election under Section 2032A(d)(3). The estate failed to file any type of recapture agreement with the estate tax return. The heirs thus did not consent to the imposition of the recapture tax. Because the existence of a valid and enforceable recapture agreement is fundamental to the special use valuation election, it cannot be said that the imperfect election submitted by the estate "substantially complied" with the requirements of the regulations, as the statute mandates (26 U.S.C. 2032A(d)(3)(B)). As the court of appeals correctly concluded, the failure to

attach this required agreement is not a technical or minor defect that may later be cured under Section 2032A(d)(3) because the recapture agreement is an indispensable ingredient of any special use valuation election (Pet. App. 13a).

Every court that has ruled on this question has reached this same conclusion. "During the decade since subsection (d)(3) was added to § 2032A by [the 1984 legislation], in not one case in which no Recapture Agreement (or other contractually sufficient substitute, personally binding the qualified heirs and enforceable under state law) had been submitted contemporaneously with the estate tax return has substantial compliance been found and post-filing perfection permitted." *Estate of Hudgins* v. *Commissioner*, 57 F.3d 1393, 1405 (5th Cir. 1995). See *McDonald* v. *Commissioner*, 853 F.2d 1494 (8th Cir. 1988), cert. denied, 490 U.S. 1005 (1989); *Foss* v. *United States*, 865 F.2d 178 (8th Cir. 1989); *Prussner* v. *United States*, 896 F.2d at 222; *Bartlett* v. *Commissioner*, 937 F.2d 316 (7th Cir. 1991).[3]

3. The court of appeals also correctly rejected petitioners' contention that the estate's defective election could be perfected under Section 1421 of the

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[3] Petitioners err in contending (Pet. 26-28) that the absence of a recapture agreement was not material because, as personal representatives of the estate, they would be personally liable under state law for any additional federal estate tax later imposed. Liability for federal estate taxes is a matter of federal law, not state law. Under Section 2204 of the Code, the executor or personal representative of an estate, upon payment of the amount of the estate tax determined by the Internal Revenue Service, is generally "discharged from personal liability for any deficiency in tax thereafter found to be due . . ." 26 U.S.C. 2204.

Tax Reform Act of 1986. That statute applies only to the estates of decedents who died before January 1, 1986. By its terms, it limits relief to situations in which the executor provided "substantially all the information with respect to such election required on such return of tax." See pages 4-5, *supra*. The legislative history discloses that this provision was enacted because incomplete instructions on one edition of the 1982 estate tax return (Form 706) had caused some taxpayers to fail to comply with the regulatory requirements for making a valid election. See S. Rep. No. 313, 99th Cong., 2d Sess. 876 (1986); H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. Pt.2, at 770-771 (1986).

The March 1985 version of the Form 706 used by the estate in this case, however, expressly specified that a valid and enforceable recapture agreement, signed by all of the heirs, must be submitted with the return (Pet. App. 28a). Indeed, petitioners do not contend that the estate's failure to comply with this regulatory requirement had anything to do with any error in the instructions on the return. In this context, the court of appeals correctly held (*id.* at 29a) that, by failing to submit the recapture agreement with the return, the estate did not "provide[] substantially all the information with respect to such election required on such return of tax" (100 Stat. 2716) and is therefore not eligible for the relief provided by Section 1421 of the Tax Reform Act of 1986.

Petitioners correctly point out (Pet. 16) that the Seventh Circuit reached a different conclusion in *Prussner* v. *United States*, *supra*. In *Prussner*, the court held that the phrase "information with respect to such election required on such return of tax" in Section 1421(a)(2) does not include the recapture

agreement that is "required on such return" because that agreement is to be attached to, not placed "on," the return. 896 F.2d at 225-226. In our view, however, the decision in *Prussner* is incorrect for the reasons carefully and clearly explained in comprehensive detail by the court of appeals in this case (Pet. App. 16a-29a).

Further review of this conflict is, in any event, not warranted. Section 1421 is a transitional rule that, by its express terms, applies only to the estates of decedents who died before January 1, 1986. The conflict between the Seventh and Eleventh Circuits as to the proper scope of the relief provided under Section 1421 for invalid special use elections thus plainly lacks any recurring importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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